TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 264.

EVENS PATTERSON ET AL., APPELLANTS,

vs.

JOHN Y. STEWART ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED JANUARY 7, 1904.

(18,886.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 254.

C. EWING PATTERSON ET AL., APPELLANTS,

vs.

JOHN Y. HEWITT ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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a In the Supreme Court of the United States, October Term, A. D. 1903.

C. EWING PATTERSON ET ALS., Appellants, vs. JOHN Y. HEWITT ET ALS., Appellees. } No. —. Appeal from Supreme Court, Territory of New Mexico.

Transcript of Record.

1 Be it remembered, that, heretofore, on the twenty-first day of July, A. D. 1898, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of record, in a certain cause entitled, C. Ewing Patterson, *et al.*, appellants, *vs.* John Y. Hewitt, *et al.*, appellees appeal from the district court of the county of Lincoln, which said transcript of record, was in part, as follows, to-wit:

2 Be it remembered that on the twenty-ninth day of April 1893 there was filed in the office of the clerk of the district court of the fifth judicial district of the Territory of New Mexico, sitting within and for the county of Lincoln, in said district, a bill of complaint in the words and figures following, to-wit:

TERRITORY OF NEW MEXICO, *County of Lincoln,* } *ss:*

In the District Court for the County of Lincoln, Sitting for the Trial of Causes Arising under the Laws of the Territory of New Mexico, in the Year 1893.

To the Honorable A. A. Freeman, associate judge of the supreme court of said Territory and judge of said district court:

C. Ewing Patterson, a resident of the county of Monmouth, in the State of New Jersey, and Henry J. Patterson, a resident of the county of Bernalillo, in said Territory of New Mexico, bring this their bill of complaint against John Y. Hewitt, William Watson and Mathew Hoyle, residents of the said county of Lincoln, Harvey B. Fergusson, a resident of said county of Bernalillo, and Old Abe Company,
3 a corporation organized under the laws of the Territory of New Mexico, and having its principal place of business at White Oaks in said county of Lincoln, and thereupon complainants show to your honor the following:

1. From 1881 to 1885 complainants were engaged in the business of mining and prospecting for mines and leads of valuable ore in the White Oaks mining district, in said county of Lincoln, and in the course of such business they, jointly with Charles A. Buford

and Edward Morrow, located, in accordance with the mining laws of the United States, a claim known as the Consolation lode, within the limits of which complainant, Henry J. Patterson, had discovered mineral bearing rock in place, on the 13th. day of October, 1881; and the certificate of the location of said claim, in accordance with the laws of the United States, was made on the 17th. day of October, 1881, and duly recorded in the records of the county of Lincoln, on the 22nd. of October, 1881, a copy of said certificate being filed herewith, marked Exhibit "A," and hereby made a part hereof.

2. In the further prosecution of their said business, complainants, together with said Buford and Morrow, on the 18th. day of October, 1881, claimed and located a tunnel site, by the name of Hidden Treasure, situate in the White Oaks mining district, for the purpose of development of the veins and lodes of the said Consolation mining claim, and for the discovery of mines generally, the
4 notice of such location and accompanying affidavit being recorded in the county records of said county on the 22nd. of October, 1881, and a copy thereof, marked Exhibit "B," is filed herewith and made a part hereof.

3. Said Buford and Morrow, shortly after the location of said claim and tunnel site, abondoned the same and gave up and surrendered all claim that they might or could have had hereto, and have never made or asserted any claim to said property since that time. The said Morrow shortly afterwards left the country, while said Buford remained in the vicinity of White Oaks until two or three years ago, when he was accidentally killed.

4. Complainants continued to work upon said claim and tunnel site at intervals, the said Henry J. Patterson doing the actual work upon the ground, or superintending the same, and before the end of the year 1883, they had discovered another lode or vein of mineral bearing rock in place, which lode is the one upon which certain locations called the White Oaks and Robert E. Lee, hereinafter referred to, were made, and upon which nearly all of the operations of defendant, Old Abe Company, have been carried on. Before the end of the year 1883, and before the agreement hereinafter set up was made, complainants had done work on said claim and tunnel, to the amount of about two thousand dollars and had had a mill run of the ore from said last mentioned lode or vein, which realized
5 about thirteen dollars per ton, and assays had been made from the ore from said vein, which showed upwards of two hundred ounces of gold to the ton.

5. Sometime prior to this a claim had been located under the name of the Old Abe, by James Allen, —— Livingston and O. D. Kelsey, and said Old Abe location and the Consolation claim conflicted with each other. The locators of the Old Abe claim had failed to do their work, and their rights under the law had lapsed and been lost, but said locators did not admit this to be the fact, and insisted upon their rights to said claim, and in consequence of this denial and dispute as to the rights of the parties, in part at

least, the agreement hereinafter set up was entered into so as to avoid dsputes. Prior to the making of said agreement said Allen and Livingston had died.

6. In the latter part of the year 1883, a meeting was held at White Oaks of a portion of the parties interested, for the purpose of harmonizing their different interests. At said meeting there were present the complainants, the defendant William Watson, who was interested as a partner of complainant C. Ewing Patterson, one Eugene B. Chase, administrator of said James Allen, James Redmond, John Woodland, Jerry Hockradle and W. S. Hathaway, said four last named persons claiming the interest of said Livingston, and defendant, John Y. Hewitt, who was present as the friend and legal adviser of all the parties. At said meeting it was agreed, in consideration of the conflict existing
6 between the claimants of the different mining claims and of the tunnel site and to harmonize all the interests, that the tunnel site and mining locations should be abandoned; that the new location should be made by Hewitt in his own name, as attorney and trustee of all of said parties for his and their joint benefit, upon the discovery which had been made by complainant Henry J. Patterson, and that he should contribute his professional knowledge and skill as a lawyer, time and services, to the joint business, and receive therefor an equal one-eighth interest with the other parties in the property. It was agreed that the property should be owned in the following proportions: Henry J. Patterson, C. Ewing Patterson, William Watson, the heir and representative of James Allen, Lehman Spiegelberg, O. D. Kelsey and John Y. Hewitt, one-eighth each; Jerry Hockradle, W. S. Hathaway, one twenty-fourth each, and James Redmond and John Woodland, one twenty-fourth jointly. The said Spiegelberg was not represented at the meeting, but it was believed at that time that he had some interest in the Old Abe location, but shortly afterwards defendant Hewitt informed and advised the other parties interested that this was a mistake, and *the* Spiegelberg really had no interest in the claim, and it was agreed by all the parties that the one-eighth which had been set aside for him should go to defendant Harvey B. Fergusson, in consideration of his contributing the sum of five hundred dollars for development work upon the property. It was further agreed that each of the parties in interest should con-
7 tribute his proportionate share in work, supplies or money, towards performance of a sufficient amount of work on each claim to entitle the owners to a patent from the United States, and that when that amount of work should be done, the said Hewitt should make application for patents and should attend to all the business and proceedings in connection therewith; and the said Hewitt promised and agreed to make such locations as aforesaid in his name as the trustee for the joint benefit of himself and the other parties, in the proportions hereinbefore set out, and to convey to said parties respectively, their interests in the property when they should

have carried out their agreement as to performance of work as above stated.

7. The said parties in interest, immediately after said agreement, went to work upon the property, contributing their personal services or money, or both, the work being carried on under the superintendence of Henry J. Patterson, and within less than a year a great deal more than the necessary amount of work to justify applications for patents had been done upon the property, in value not less than fifteen hundred dollars.

8. Afterwards, on the 2nd. day of May, 1884, in accordance with said agreement, defendant Hewitt did make two locations, in conformity with the laws of the United States, of two mining claims, named the Robert E. Lee and White Oaks respectively, upon the vein ledge or lode which had been discovered, as hereinbe-
8 fore set out, by complainant Henry J. Patterson, and thus acquired the legal title to said two claims, by and with the consent of the complainants, without which he could not have made said locations, and which was given only in consequence of his promise and agreement as hereinbefore set out to act as trustee for the benefit of all the parties interested.

9. In the winter of 1884 and 1885, after the completion of the work aforesaid, complainant, Henry J. Patterson, having incurred a considerable amount of indebtedness, was desirous of securing a title to his share of the property in the hope of being able therewith to realize sufficient to pay off his debts, and he therefore applied to defendant Hewitt several times for a deed for his interest, but was repeatedly put off by Hewitt upon various pretexts. Up to this time while there was a probability, there was no certainty, of the value of the property, and in view of his circumstances, complainant, Henry J. Patterson, decided to leave the White Oaks mining district temporarily, in the hope of earning sufficient money elsewhere to enable him to return and resume work upon this property, and he arranged with defendant Hewitt that his deed for his separate interest therein should be delivered to another person for him after he went -way. In March, 1885, he accordingly did leave that portion of New Mexico and from that time until the summer of 1892 was engaged in his business of prospecting and mining in various parts of the country, nearly all the
9 time outside of New Mexico, and in every State and Territory west of the Rocky mountains, and in Lower California, with varying success, but without the accumulation of sufficient funds to return to White Oaks as he had intended. Up to the fall of 1891 he never heard or knew of the condition of said mining property, but at that time in a remote portion of Arizona, by means of a newspaper he learned that the property was being operated at a profit and he returned to New Mexico to look after his interest therein, just as soon as his circumstances would permit, arriving in the Territory in June, 1892, and then learned that his interest had been entirely ignored by the defendants.

10. About the end of the year 1883, complainant, C. Ewing Patterson, having the offer of lucrative and agreeable employment at his present place of residence in New Jersey, removed from New Mexico to New Jersey, leaving his business in the hands of his complainant and brother Henry J. Patterson and his partner William Watson and has never returned to New Mexico since that time, and never knew or learned anything definite with regard to the development and operation of the said mining property until he was informed by his brother in the summer of 1892.

11. Complainants allege upon information and belief that said Hewitt admitted their interest in said two claims on several occasions and never denied or refused to recognize their rights therein until long after they had both gone away from New Mexico,
10 but he has for several years past, given out and stated that complainants have no right, title or interest in or to said claims, and has refused and still does refuse to acknowledge complainants' rights in the premises and has refused to make to them deeds for their interests as he agreed, but in violation of his trust and agreement, has conveyed all or nearly all of said property to the other defendants herein, as hereinafter set forth.

12. Defendant, Hewitt, on the 30th. of September, 1884, conveyed to Eugene B. Chase, being the same person hereinbefore mentioned as in attendance at the meeting in 1883, as administrator of the estate of James Allen, the undivided seven twenty-fourths of said two mining claims, and on the 14th. of November, 1885, said Chase conveyed to said Hewitt an undivided one-eighth of said claim; and in 1887, as complainants are informed and believe, Hewitt, by the usual proceedings under the statute relative to forfeiture of the interest of a co-owner of mining claims for failure to contribute his proportion of the expenditures required by the statute of the United States, acquired the one twenty-fourth still standing in the name of Chase.

13. Complainants allege upon information and belief that on the 9th. of September, 1887, defendant Hewitt, conveyed to defendant Fergusson the title to one third of said two mining claims, and that afterwards on the 21st. of March, 1892, said Fergusson, conveyed all of his right, title and interest in said two claims to defendant Old Abe Company.

11 14. Complainants allege on information and belief that on the 9th. of July, 1889, defendant Hewitt, conveyed to defendant Watson, the title to an undivided one-fourth of said two claims; that afterwards, on the 9th. of June, 1890, said Watson conveyed to defendant Hoyle, the title to an undivided one-eighth of said two claims; that afterwards, on the 22nd. of March, 1892, said Hoyle conveyed to defendant, Old Abe Company, the title to five forty-eight-s of said two claims, thus leaving in himself the legal title to one undivided forty-eighth thereof; and that on the day and year last aforesaid said Watson attempted to convey to said Old Abe

Company eleven forty-eighths of said two claims, that being five forty-eighths more than he appears to have had.

15. Complainants allege on information and belief that on the 22nd. of March, 1892, defendant Hewitt conveyed to said Old Abe Company the title to an undivided third of said two claims, thus apparently leaving in himself the legal title to an undivided twelfth thereof.

16. In September, 1889, defendants, Hewitt, Watson and Fergusson made applications for patents on said two lodes or claims, but as to whether such patents have as yet been actually received by defendants or either of them, complainants are not informed. Copies of the notices that such applications have been made, issued by the register of public lands for the land office at Las Cruces, at New
12 Mexico, are filed herewith marked Exhibits "C" and "D."

17. Defendants Hewitt, Watson, Hoyle, Fergusson and Old Abe Company, have been for several years, complainants being unable to state the precise length of time, and now are, carrying on mining operations on said two claims, and have extracted therefrom large quantities of mineral bearing rock, rich in gold, and have converted the same and the proceeds thereof to their own use, the aggregate value thereof being as complainants are informed and believe, not less than six hundred thousand dollars, and have utterly failed, neglected and refused to account for same or any portion thereof, to complainants or to either of them although they, the defendants aforesaid, and each of them, always well knew and had notice of complainants' rights and claims in the premises and of all the facts herein set up, and had such knowledge and notice at and before times when they respectively acquired any interest or title, which they may have in or to said property.

18. At the time of the acceptance by him of the trust hereinbefore set out and for several years thereafter, defendant Hewitt was a man of little or no means, in the receipt of a small income from the practice of his profession and in debt to an amount exceeding the value of any property he may have had, so that he was in effect insolvent; but he is now a man of large wealth in mines, banks, houses, stocks, bonds,
13 money and other property, all of which he has acquired with the proceeds of the ore taken from the said two lodes or claims, and as the direct result of his violation of his duties as such trustee as aforesaid, and of his conversion of trust property and funds to his own use. A portion of the real estate thus acquired by him is as follows: Town lots in the town of White Oaks, New Mexico, described as follows: Lot 4 in block 5, lots 4 and 8 in block 34, lot 1 in block 22, eastern half of lot 3 in block 5, eastern half of lot 3 in block 36, western half of lot 4 in block 36, lot 8 in block 5; town lots in the City Lode addition to said town of White Oaks described as follows: Lots 2, 3, 4, 5, 9, 10, 12, 14, 15, 16, 17, 18, 19, 20, 23, all on Lincoln avenue, lot 1 on Willow street, lots 1, 2 and 6 on Grand street, lots, 1, 2, 3, 5, 6 and 7 on Piñon street, lots 1, 2, 4, 6, 7

8, 9 and 10 on Pine street and lots 2, 4, and 5 on Placer street; an undivided interest in the Little Mac mine, situated in Baxter mountain, White Oaks mining district, New Mexico; an undivided twelfth part of the said Robert E. Lee and White Oaks lodes or claims. He also has as complainants are informed and believe, about ten thousand dollars in stock of the Exchange bank, a corporation organized under the laws of the Territory of New Mexico, and doing business in said town of White Oaks, and a large amount of stock, not less than four hundred thousand dollars in Old Abe Company, and other valuable property, as to which complainants have no such knowledge as will enable them to set forth and describe the same.

14 19. The mining operations on said two lodes or claims by defendants have been carried on in an unskillful, improper, careless and expensive manner, so that the property has been greatly injured and damaged, and the extraction of ore therefrom has cost much more than it would have cost under skillful and economical management, and complainants allege that defendants, unless restrained by this court, will continue said mining operations in the same unskillful, improper and expensive manner, whereby the very substance of the property will be greatly wasted and destroyed and the mines entirely ruined.

To the end, therefore, that defendants and each of them may full, true and perfect answer make to the premises as fully as if the same were here repeated and they each, respectively, particularly interrogated thereto, but not under oath, answer under oath being hereby expressly waived, and that said defendant John Y. Hewitt be declared to have acquired and taken the title to said two claims, known as the Robert E. Lee and the White Oaks claims, in trust, for the benefit of complainants, to the extent of one-fourth thereof; that defendants Fergusson, Watson, Hoyle and Old Abe Company be declared to have taken title to portions of said two claims with full knowledge and notice of the rights and claims of complainants and that said complainants have a lien upon said property and the rents, issues and profits thereof already received or hereafter

15 accruing in the hands of said other defendants in the same manner and to the same extent as they have or might have had in the hands of said Hewitt; that an account be taken under the direction of the court, of all ore taken from said claims by defendants or any of them, and of the value of the same, and that said Hewitt be required by the court to pay over to complainants a sum of money equal to one-fourth of the value of all such ore so taken from said two claims, without any allowance, rebate or reduction on account of the cost or expense of mining, removing and milling or otherwise treating said ore; that said Hewitt and said Old Abe Company be required by the court to convey to complainants free and clear of all incumbrance or lien an undivided fourth part of said two claims, the court making such provision in its decree as may be necessary and proper for the protection of stockholders in said company other

than said Hewitt; that all of the property held by said Hewitt both real and personal be declared by the court to be subject to a lien on behalf of complainants for the payment of their full one-fourth share of the value of such ore as aforesaid, which may have been taken from said two claims; that said defendants, Fergusson, Watson, Hoyle and Old Abe Company be required under the direction of the court to render an account of what has been received by them and each of them from the proceeds of the ore taken from said claims; and in case said Hewitt, shall not be possessed of a sufficient amount of property to fully pay what may be found due to com-
16 plainants that said other defendants shall be required by the decree of this court to pay the deficiency, and that complainants be declared to have a lien upon the whole of said two claims for the payment of such deficiency; that said defendants, their agents, attorneys and officers, and each of them, be restrained and enjoined from in any manner selling, conveying, mortgaging or otherwise encumbering the said mining claims or any portion thereof, or any of the property hereinbefore described and set out as having been acquired by said Hewitt or any other property which they or either of them have acquired by means of the proceeds of ore taken from said two mining claims; that a receiver be appointed by the court to take charge of the two said mining claims and of all improvements thereon and of all property of said Old Abe Company with power and authority to continue mining operations upon said property and to take ore therefrom, and to extract or cause to be extracted from said ore the precious metals contained therein, and to sell the same and to hold the proceeds of such sale subject to the orders of the court for the benefit of all the parties interested; and that complainants have such other and further relief as to the court shall seem meet and as the case may require.

May it please your honor to grant unto complainants the writ of subpœna issuing out of and under the seal of this court, directed to the said John Y. Hewitt, William Watson, Mathew Hoyle,
17 Harvey B. Fergusson and Old Abe Company, commanding them and each of them upon a day and under a penalty to be therein fixed, to be and appear before this honorable court, and to stand to, abide and perform the judgment of the court in the premises.

(Signed) HENRY J. PATTERSON.

(S'g'd) FRANK W. CLANCY,
Solicitor for Complainants.

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

Before me, the undersigned, a notary public, in and for said county, on this 14th. day of April, 1893, personally appeared Henry J. Patterson, who being duly sworn, upon his oath did say, that he

has read over the foregoing bill of complaint by him subscribed as one of the complainants therein, and that the same is true of his own knowledge, except, as to the matters therein charged upon information and belief, and as to those matters he believes it to be true.

In testimony whereof, I have hereunto set my hand and notarial seal on the day and year last above written.

(Signed) H. P. OWEN,

[SEAL.] *Notary Public, Bernalillo County, New Mexico.*

18 EXHIBIT A.

Location Certificate.

TERRITORY OF NEW MEXICO, } ss:
County of Lincoln, }

Know all men by these presents, that C. E. Patterson, Charles A. Buford, Henry J. Patterson and Edward Morrow, citizens of the United States, and the undersigned, have this thirteenth day of October, 1881, located and claimed and by these presents do locate and claim, by right of discovery and location, in compliance with the mining acts of Congress, approved May 10, 1872, and all subsequent acts, and with local customs, laws and regulations, eight hundred and nineteen and one half linear feet and horizontal measurement on the "Consolation" lode, vein, ledge or deposit, along the vein thereof, with all its dips, angles and variations, as allowed by law, together with one hundred feet on the southwest side and one hundred feet on the north east side of the middle of said vein at the surface, so far as can be determined from present developments; and all veins, lodes, ledges or deposits and surface ground, within the lines of said claim, one hundred and fifty and one half feet running north 30 degrees 20 minutes west, from center of discovery shaft; and six hundred and sixty-nine feet running south 30 degrees 20 minutes east from center of discovery shaft; said discovery shaft being situate upon said lode, vein, ledge, or deposit, and within
19 the lines of said claim, in White Oaks mining district, county of Lincoln and Territory of New Mexico, described by metes and bounds to-wit: Beginning at the north end center stake, (one hundred and fifty and one half feet north thirty degrees twenty minutes west from an iron pin driven in the rock upon the face of the Hidden Treasure tunnel site,) said stake being marked (S 344. C. 5," thence north twenty-four degrees thirty minutes east one hundred and three and one-half feet to north-east corner stake marked S 344 C. 1" thence south thirty degrees and twenty minutes east, eight hundred and thirty-five feet more or less to a stake at the south-east corner, marked "S. 344 C 2." Thence south fifty-nine degrees forty minutes west one hundred feet to a stake set for south end center, said stake being marked "S 322 S. E. C" and standing

south thirty degrees twenty minutes east eight hundred and nineteen and one-half feet along the course of the lode and center line of claim from point of beginning.

Thence upon prolongation of said line and course one hundred feet to stake set for south-west corner, marked "S. 344 C. 3;" thence north thirty degrees twenty minutes west eight hundred and eight feet more or less to stake set for north-west corner, marked "S. 344 C. 4;" thence north seventy degrees east one hundred and seven feet to stake at north end center and point of beginning.

The iron pin in face of tunnel upon center line of said claim, one hundred and fifty and one-half feet south thirty degrees and
20 twenty minutes east from north end center of claim bears north thirty-three degrees east seven hundred and five feet from the officially established north-east corner of the "Homestake mine."

Said lode was discovered on the 13th. day of October, A. D., 1881.

Date of location, October 13, A. D., 1881.

Date of certificate, October 17th. A. D., 1881.

C. H. BUFORD. [SEAL.]
HENRY J. PATTERSON. [SEAL.]
EDWARD MORROW. [SEAL.]
C. E. PATTERSON. [SEAL.]

Filed and recorded October 22nd., 1881, at 2:30 p. m.

BEN H. ELLIS, *Recorder*,
By WM. O. BURT, *Deputy*.

EXHIBIT B.

Tunnel Site Location.

Notice is hereby given that the undersigned citizens of the United States have this 18th. day of October, A. D., 1881, claimed and located the "Hidden Treasure" tunnel site, situate in White Oaks mining district in the county of Lincoln and Territory of New Mexico, on the north and east side of Baxter gulch, more
21 particularly described as follows, to wit: Commencing at the face of the tunnel which is located and designated by an inch iron pin driven into the rock with board secured thereto containing location notice, which said iron pin is fifty three feet in an easterly direction from the centre of Baxter gulch, and also about three hundred and eighty three fees in an easterly direction from Winter's log cabin and Arastra, thence running north fifty four degrees east five hundred and fifty feet to a stake and stone monument marked "east and centre of Hidden Treasure tunnel site" and then to end.

The lines and course of said tunnel being five feet each side of the centre line thereof are marked by posts, and by monuments of stone

every fifty feet along the whole course thereof. The said tunnel is to be seventy feet in height and ten feet in width, and is claimed and located for the purpose of development of the veins and lodes of the "Consolation" and "Hindoo" mining claims and for the discovery of mines.

Located October 18th., 1881.

C. A. BUFORD,
HENRY J. PATTERSON,
EDWARD MORROW,
C. E. PATTERSON,
Locators Hidden Treasure Tunnel Site.

22 TERRITORY OF NEW MEXICO, } ss:
County of Lincoln, }

Charles A. Buford, Henry J. Patterson and Edward Morrow, of said county, being duly sworn according — law on their respective oaths say that they are the claimants, projectors and locators of the "Hidden Treasure tunnel site," a copy of location notice of same, full and correct being hereto attached, that they have expended in prospecting work on said tunnel seventy five dollars, that they have performed work to the extent of running a cut and tunnel seven feet in width and an average of seven feet in height, and that it is *bona fide* their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of the veins and lodes of the "Consolation" and "Hindoo" mining claims.

H. J. PATTERSON.
CHAS. A. BUFORD.
EDWARD MORROW.

Sworn and subscribed to before me this 18th. day of October, A. D., 1881.

W. C. McDONALD,
Notary Public.

Filed and recorded October 22nd., 1881, at 2:30 p. m.
BEN H. ELLIS, *Recorder*,
By WM. O. BURT, *Deputy*.

23 EXHIBIT C.

Mining application No. 516.

UNITED STATES LAND OFFICE,
LAS CRUCES, N. MEX., *September* 14, 1889.

Notice is hereby given that John Y. Hewitt and William Watson whose post office address is White Oaks, New Mexico, and Harvey

B. Fergusson, whose post office address is Albuquerque, New Mexico, by his attorney in fact, John Y. Hewitt, have this day filed their application for a patent, for fourteen hundred and seventy linear feet of the Robert E. Lee lode or vein bearing gold, with surface ground 594 and 598.6 feet in width, situate in White Oaks mining district, Lincoln county New Mexico, and designated by the field notes and official plat on file in this office as survey No. 758 in tp. 6 S. of range 11, E. N. M. principal meridian, said survey No. 758, being described as follows, to-wit:

Beginning at corner No. 1 a porphyry stone 26 x 12 x 7 ins. set ½ in ground, chiseled 1—758. Whence the corner of sects. 25, 26, 35 and 36, tp. 6, S. range 11 E., bears S. 28 degrees 42 minutes W. 2330.32 feet; thence south 88 degrees 30 minutes east 594 feet, to corner No. 2, a porphyry stone 6 x 15 x 30 ins. set ½ in ground chiseled 2—758. Thence N. 1 degree 20 minutes E. 1470 feet, to corner No. 3 a porphyry stone 5 x 12 x 28 ins. set ½ in ground, chiseled 3—758. Thence N. 88 degrees 30 minutes W. 598.6 feet to corner No.
24 4, a porphyry stone 10 x 12 x 27 ins. set ½ in ground chiseled 4—758. Thence S. 1 degree 10 minutes W. 1470 feet to corner No. 1 and place of beginning.

Saving and excepting from this the Robert E. Lee lode, all that portion thereof in conflict with the Miguel Otero lode sur. No. 203, which is bounded and described as follows, to-wit: Commencing at a point 656 feet N. 1 degree 20 minutes E. from corner No. 2 of this the Robert E. Lee lode; thence N. 36 degrees 30 minutes W. 655 feet to corner No. 3 of said Miguel Otero lode sur. 203. Thence N. 5 degrees 30 minutes E. 484 feet to intersection of 3—4 line of this survey No. 758; thence S. 88 degrees 30 minutes E. 19.5 — to corner No. 3 of this survey, No. 758. Thence S. 1 degree 20 minutes W., 814 feet to place of beginning, which said portion in conflict with survey No. 203, and hereby excepted contains 3.82 acres. Also saving and excepting all that portion of this the Robert E. Lee (not included in the conflict with survey No. 203) in conflict with the Lady Godiva lode survey No. 683 bounded and described as follows, to-wit: Beginning at a point on the 3—4 line of this survey No. 758, 292.1 feet north, 88 degrees 30 minutes W. from corner No. 3 thereof; thence N. 88 degrees 30 minutes west 306.5 feet to corner No. 4 of this survey No. 758. Thence S. 1 degree 10 minutes W. 1048 feet to intersection of 2—3 line of said survey No. 683. Thence N. 17 degrees 30 minutes E. 1090 feet to place of beginning. Which last named excepted portion containing 3.838 acres. Said excepted portion contains
25 7.658 acres. The total area claimed in this application is 12.448 acres.

The location of this mine is recorded in the recorder's office of Lincoln county, in Book O of page 5 of mining records. The adjoining claims are, north unknown; east, Miguel Otero survey 203; south, White Oaks Lode survey 759; west, Lady Godiva lode survey 683.

Any and all persons claiming adversely any portion of the said Robert E. Lee lode or surface ground are required to file their adverse claims with the register of the United States land office at Las Cruces in the Territory of New Mexico, during the sixty days' period of publication hereof, or they will be barred by virtue of the provisions of the statutes.

EDMUND G. SHIELDS, *Register.*

EXHIBIT D.

Mining application No. 517.

United States land office.

LAS CRUCES, N. M., *September* 14, 1889.

Notice is hereby given that John Y. Hewitt and William Watson whose post office address is White Oaks, New Mexico, and Harvey B. Fergusson, whose post office address is Albuquerque, New Mexico,
by John Y. Hewitt, his attorney in fact, have this day filed
26 their application for a patent, for fourteen hundred and ninety-nine linear feet of the White Oaks lode or vein bearing gold, with surface ground 594 feet in width, situated in White Oaks mining district, Lincoln county New Mexico, and designated by the field notes and official plat on file in this office as survey No. 759 in tp. 6 S. of range 11, E. N. M. principal meridian, said survey No. 759, being described as follows, to-wit:

Beginning at corner No. 1 a porphyry stone 26 x 12 x 7 ins. set ¾ in ground, chiseled 1—759. Whence the corner of sects. 25, 26, 35 and 36, tp. 6, S. of range 11 E., bears S. 28 degrees 42 minutes W. 2330.32 feet; thence S. 88 degrees 30 minutes east 594 feet, to corner No. 2, a porphyry stone 30 x 15 x 6 ins. set ¾ in ground chiseled 2—759. Thence S. 0 degrees 50 minutes W. 1499 feet, to corner No. 3 a granite stone 5 x 12 x 24 ins. set ¾ in ground, chiseled 3—759. Thence N. 88 degrees 30 minutes W. to corner No. 4, a sandstone chiseled 4—759. Thence N. 0 degrees 50 minutes 1499 feet to corner No. 1 and place of beginning. The magnetic variation being 12 degrees 40 minutes.

Saving and excepting from this White Oaks Lode, mining claim all that portion thereof in conflict with the Miner's Cabin lode survey No. 557. He Horse lode survey No. 755. Empire lode survey No. 734. May lode survey No. 704 and the Silver Cliff lode survey No. 558. Which said excepted portion is bounded and described as follows, to-wit:

27 Beginning at a point on the 2—3 line of survey No. 754, Empire lode, 828 feet S. 00 degrees 50 minutes W. from cor. No. 2 of this the White Oaks lode, and thence S. 00 degrees 50 minutes W. 607.5 feet to the intersection of 3—4 line of survey No. 755, He Horse lode. Thence S. 53 degrees 57 minutes 46 seconds W.

109 feet. Thence N. 88 degrees 30 minutes W. 505 feet to cor. No. 4, of this the White Oaks Lode claim. Thence N. 00 degrees 50 minutes E. 587.5 feet to intersection of 1—2 line of survey 704a May lode. Thence S. 78 degrees E. 283.9 feet to intersection of 1—4 line of survey No. 557, Miner's Cabin lode. Thence N. 37 degrees W. 446.63 feet to 1—4 line of this survey, White Oaks lode. Thence N. 00 degrees 50 minutes E. 489 feet to 2—3 line of survey No. 557. Miner's Cabin lode. Thence S. 37 degrees E. 836 feet to cor. No. 3, Miner's Cabin lode, survey 557. Thence S. 53 degrees W. 597.07.

Thence N. 53 degrees 57 minutes 46 seconds E. 324.78 feet to cor. No. 1. He Horse lode survey No. 755. Thence S. 30 degrees 56 minutes 30 seconds E. 87.92, — to the 3—4 line, Empire lode. survey No. 744. Thence N. 6 degrees W. 11.6 feet to cor. No. 3 Empire lode, survey No. 754. Thence N. 81 degrees 24 minutes 26 seconds E. 6 feet to place of beginning.

Said excepted portion containing 13-233 acres. The total net area claimed in this application is 7.207 acres.

The location notice of this mine is recorded in the recorder's office of Lincoln county, in Book — at page — of mining records.

28 The adjoining claims are survey 557, 558, 630, 740 and 755. The Baxter placer and Sager lode.

Any and all persons claiming adversely any portion of said White Oaks lode, or surface ground, are required to file their adverse claims with the register of the United States land office at Las Cruces, in the Territory of New Mexico, during the sixty days' period of publication hereof, or they will be barred by virtue of the provisions of the statute.

EDMUND G. SHIELDS, *Register.*

Subpœna in chancery having been duly issued and served upon the defendants, the defendants appeared and on the 27th. day of June 1893 filed their answer to the said bill of complaint, in the words and figures following, to-wit:

TERRITORY OF NEW MEXICO, } ss:
County of Lincoln, }

In the District Court of the Fifth Judicial District.

Joint and several answer of John Y. Hewitt, William Watson, Matthew Hoyle, residents of the said county of Lincoln; Harvey B. Fergusson, a resident of the county of Bernalillo, and Old Abe Company, a corporation organized under the laws of the Territory of New Mexico and having its principal place of business at White Oaks, in said county of Lincoln, defendants, to the bill of
29 complaint of C. Ewing Patterson and Henry J. Patterson, complainants.

These defendants, now and at all times hereafter, saving and reserving unto themselves, respectively, all benefit and advantage of exception, which can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as these defendants are advised it is or are material or necessary for them to make answer unto, answering, say that they have not, nor has either of them knowledge or information sufficient to form a belief as to whether or not the said complainants were engaged from 1881 to 1885, or at any other time in the business of mining and prospecting for mines and leads of valuable ore in the White Oaks mining district, in said county of Lincoln, or whether or not in the course of such business they, jointly with Charles A. Buford and Edward Morrow, located, in accordance with the mining laws of the United States, a claim known as the Consolation lode, within the limits of which complainant Henry J. Patterson had discovered mineral bearing rock in place on the 13th. day of October, 1881; nor as to whether or not the certificate of the location of said claim in accordance with the laws of the United States was made on the 17th. day of October, 1881 and duly recorded in the records of the
30 county of Lincoln on the 22nd. day of October, 1881; nor whether or not the said paper marked Exhibit "B" filed with said bill is a copy of said alleged certificate, and these defendants ask that strict proof thereof be required.

These defendants further answering, say that they have not, nor has either of them, been informed save by the complainants' said bill, whether or not the said complainants, together with said Buford and Morrow in the further prosecution of their said business, on the 18th. day of October, 1881, claimed and located a tunnel site by the name of Hidden Treasure, situate in the White Oak mining district, for the purpose of the development of the veins and lodes of the said alleged Consolation mining claim, and for the discovery of mines generally; nor as to whether or not the notice of said alleged location and accompanying affidavit are recorded in the

county records of said county on the 22nd. day of October, 1881; nor as to whether Exhibit "B" filed with said bill is a copy thereof, and these defendants pray that strict proof thereof be required.

And these defendants further answering, say that they have not sufficient knowledge and information to form a belief as — whether or not said Buford and Morrow at any time abandoned the said alleged location and tunnel site, and gave up and surrendered all claim that they might or could have had thereto, and have never made or asserted any claim to said property; nor as to whether or not said Morrow left the country; nor as to whether or not said Buford remained in the vicinity of White Oaks until
31 two or three years ago; nor as to whether or not said Buford was accidentally killed, in manner and form as alleged in said bill, and pray that the complainants be required to make proof thereof.

These defendants further answering, say that they have not sufficient knowledge or information to form a belief as to whether or not the said complainants continued to work upon said alleged claim and tunnel site at intervals, the said Henry J. Patterson doing the actual work upon the ground or superintending the same, and require proof thereof; but these defendants respectively deny that before the end of the year 1883, they, the said complainants, or either of them had discovered another lode or vein of mineral bearing rock in place, and deny that they or either of them, then or at any other time, discovered the lode or vein of mineral bearing rock in place upon which — the locations called the White Oaks and Robert E. Lee in said bill mentioned, and upon which all or any part of the operations of defendant, Old Abe Company, had been carried on. And these defendants respectively deny that before the end of the year 1883, the said complainants or either of them, had done work on said alleged claim or tunnel in said bill mentioned, to the amount of about two thousand dollars ($2000.00), and deny that they had a mill run of the ore from said alleged lode or vein, which realized about thirteen dollars per ton, and deny that assays
32 had been made from the ore within the said vein, which showed upwards of two hundred ounces of gold to the ton, as in said complainants' bill alleged.

Defendants further answering, say they are informed and believe it to be true that a mining claim had been located under the *the* name of the Old Abe, but they are not sufficiently informed to admit or deny that the same was located by James Allen, — Livingston and O. D. Kelsey, nor as to whether or not the said Old Abe location and the alleged Consolation claim conflicted with each other, and they deny that the locators of the Old Abe claim have failed to do their work and their rights under the law had lapsed and been lost; and they deny that any agreement of the purport, tenor and effect in said bill mentioned, was ever entered into in consequence of the said denial and dispute, or for any other reason as alleged in said bill; but these defendants are informed and be-

lieve that the said James Allen and —— Livingston died sometime in the year 1883.

And defendants further answering say that they believe it to be true that in the latter part of the year 1883, a meeting was held at White Oaks, at which were present the defendants, John Y. Hewitt, William Watson and the complainants, C. Ewing Patterson and Henry J. Patterson, but these defendants are unable to admit or deny whether or not the said other persons were present at said meeting; and these defendants deny that the said meeting was held for the purpose of
33 harmonizing the alleged interests of said persons as in said bill alleged, and they deny that defendant John Y. Hewitt was present at said meeting as the friend and legal adviser of all the parties and allege that said Hewitt was present, acting on his own behalf and not otherwise. These defendant- deny that at said meeting it was agreed in consideration of the conflict existing between the claimants of the different mining claims, and of the tunnel site, and to harmonize all the interests, that the tunnel site and mining location should be abandoned, and deny that it was then agreed that new locations should be made by defendant Hewitt in his own name as attorney and trustee of all of said parties for his and their joint benefit, upon the alleged discovery, which has been made by complainant Henry J. Patterson, and that he should contribute his professional knowledge and skill as a lawyer, time and services, to the joint business and receive therefor, an equal one-eighth interest with the said other parties in the property, as in said bill alleged. And these defendants allege that at the time of said meeting, there had been no discovery of any mineral bearing lead or lode upon either or any of the said claims in said bill mentioned, by the complainant Henry J. Patterson, or by any other person or persons whomsoever. And these defendants deny that it was at said meeting, or at any other time, agreed that the property should be owned in the following proportions:

Henry J. Patterson, C. Ewing Patterson, William Watson,
34 the heir and representative of James Allen, Lehman Spiegelberg, O. D. Kelsey and John Y. Hewitt, one-eighth each.

Jerry Hockradle, W. S. Hathaway, one twenty-fourth each, and James Redmond and John Woodland one twenty fourth jointly. And these defendants say that they believe it to be true that said Spiegelberg had no interest in the alleged claim in said bill mentioned, but deny that defendant Hewitt so informed and advised the said other parties; and they deny that it was then agreed by all the said parties that the one-eighth which had been set aside for him should go to the defendant Harvey B. Fergusson in consideration of his contributing the sum of five hundred dollars ($500.00) for development work upon the said property; and they deny that it was then agreed that each of the said parties in said bill mentioned, should contribute his proportionate share in work, supplies or money, towards the performance of a sufficient amount of work on

each claim to entitle the owners to a patent from the United States and that when that amount of work should be done, the said Hewitt should make application for patents and should attend to all of the business and proceedings in connection therewith, and deny that the said Hewitt promised and agreed to make such locations as alleged in said bill in his name as trustee for the joint behalf of himself and the said other parties mentioned, in the said above mentioned propertions, and to convey to said parties respectively their interests in the property when they should have carried
35 out their alleged agreement as to performance of work as in said bill stated.

And these defendants further answering, deny that the said alleged parties in interest immediately after said pretended agreement went to work upon the property mentioned in said bill, contributing their personal services or money, or both, the work being carried on under the superintendence of Henry J. Patterson; and deny that within less than a year a great deal more than the necessary amount of work to justify applications for patents had been done upon the property, in value not less than fifteen hundred dollars ($1500.00) as in said complainants' bill alleged.

And these defendants further answering say that, by an act of Parliament, passed in England in the twenty-ninth year of the reign of King Charles the Second, entitled, an act for the prevention of frauds and perjuries, it is, among other things enacted and provided that thereafter no action shall be brought to charge any person upon any contract of lands, tenements or hereditaments or any interest in or concerning them, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the said party to be charged therewith, or some other person thereunto by him lawfully authorized; and it was thereby further provided and enacted that there and after the 24th day of June, one thousand six hundred and seventy-seven, declarations or creations of trust
36 or confidence of any lands, tenements, or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect. And these defendants insist upon the said act or statute and claim the same benefit as if they had pleaded the same herein.

And these defendants further answering, state the fact to be that on the 2nd. day of May, 1884, defendant Hewitt did make two locations in conformity with the laws of the United States of two mining claims, naming them Robert E. Lee and White Oaks, respectively, and acquired the legal title to said two claims, but they deny that said locations were so made in accordance with said pretended agreement in complainants' bill mentioned, and deny that said locations or either of them, were made upon any vein, ledge or lode which had been discovered by complainant Henry J. Patterson as in said bill alleged, and deny that they were so made by and with the consent

of complainants, or that without said consent, he could not have made said locations, and deny that said locations were so made under any promise and agreement on the part of the said Hewitt to act as trustee for the benefit of the parties alleged to be interested therein, in and by complainants' said bill.

These defendants further answering, say that they believe it to be true that in the winter of 1884 and 1885, the complainant
37 Henry J. Patterson had incurred a considerable amount of indebtedness, but deny that he had any title to any of the said property, and they deny that he applied to defendant Hewitt at any time for any deed for his pretended interest, and deny that he was repeatedly put off by said Hewitt upon various or any pretense. These defendants believe it to be true that the said Henry J. Patterson at or about said date, decided to leave White Oaks mining district, but they deny that he then decided so to leave the said district temporarily in the hope of earning sufficient money elsewhere to enable him to return and resume work upon the said property as alleged in said bill, and deny that he arranged with defendant Hewitt that any deed for any interest in said property should be delivered to any other person for him after he went away.

These defendants further answering, say that they believe it to be true and admit that the said Henry J. Patterson did in or about the month of March, 1885 leave that portion of New Mexico, and remained absent therefrom and did not arrive in this Territory until about the month of June, 1892, but these defendants deny that said Henry J. Patterson did not hear or know of the condition of said property until the fall of 1891 as alleged in said bill, and deny that said complainant Henry J. Patterson did not know until the month of June, 1892 that these defendants denied and ignored any interest, or pretended interest in said property, as alleged in said bill; and these defendants have not
38 sufficient knowledge to form a belief as to whether or not the said complainant Henry J. Patterson from March 1885 until the summer of 1892 was engaged in the business of prospecting and mining in various parts of the country, nearly all of the time outside of New Mexico and in every State and Territory west of the Rocky Mountains and in lower California, with varying success, but without the accumulation of sufficient funds to return to White Oaks; but these defendants deny that he at the time he left the said district and Territory had any intention of returning to the same but allege the fact to be that he then and thereafter abandoned the said property in said bill mentioned and all claim or interest in and to the same or any part thereof, and during the whole of said period, the said complainant Henry J. Patterson and his co-complainant C. Ewing Patterson deserted and abandoned the said property and wholly failed, neglected and refused to pay any part of the cost, labor and expenses of prospecting for discovering and locating the said lead or lode within the limits of said Robert E. Lee and White Oaks claims, hereinbe-

fore mentioned, or of mining and developing the same, or of performing the necessary annual assessments either in work or labor thereon; and defendants allege that neither of the said complainants then had or have since acquired or now has any interest, right or title whatever either in law or in equity in and to the said mining claims hereinbefore mentioned, and called and known as the Robert E. Lee and White Oaks, respectively.

39 These defendants further answering, say it is true that the complainant, C. Ewing Patterson, about the end of the year 1883 removed from New Mexico to New Jersey and has ever since resided and now resides in said State and has never returned to New Mexico since that time, but these defendants deny that he left his business in the hands of his co-complainant Henry J. Patterson and his partner William Watson; and these defendants have not sufficient information to admit or deny whether he ever knew or learned anything definite with regard to the development and operation of the said mining property in said bill mentioned until he was informed by his brother in the summer of 1892; but these defendants state and charge the fact to be that the said complainant C. Ewing Patterson, about the end of the year 1883 abandoned the said property in said bill mentioned and left this Territory permanently and since said date, has never in any manner advanced, paid or expended any money or performed any service in and about the discovered location and development of the said two mining claims, called and known as the Robert E. Lee and White Oaks respectively, hereinbefore mentioned, or in and about the performing of the annual assessment work and labor thereon and that said complainant C. Ewing Patterson had and had no interest, claim or title whatever either in law or in equity in or to said mining claims or either of them, or any part thereof.

These defendants further answering, deny that said defend-
40 ant Hewitt ever admitted the said alleged interest of said complainants in said two claims, or recognized their rights therein at any time since the discovery and location of the said vein, lode or ledge within the boundaries of said claims, but these defendants believe it to be true and admit that said Hewitt has, for several years past, given out and stated that complainants have no right, title or interest in or to said claims, and has refused and still does refuse to acknowledge the complainants' pretended rights in the premises and has refused to make to said complainants deeds for their said alleged interests, and denies that he agreed so to do in manner and form, as in said bill alleged; and defendants admit that said Hewitt has conveyed, together with his co-defendants herein, all of the said two mining claims, called and known as the Robert E. Lee and White Oaks, respectively, to the defendant Old Abe Company; but these defendants deny that such conveyance by said Hewitt was in violation of any trust or agreement as in complainants' bill alleged, but on the contrary thereof, these defendants allege that such conveyance and conveyances in said bill men-

tioned are and were respectively made by the said grantors thereof in the exercise of full and complete legal and equitable title to said property and as they lawfully and equitably might respectively, free and clear of any title claim or interest therein on the part of said complainants, respectively, and that the defendant, The Old Abe Company is now the legal and equitable owner of the same.

41 And these defendants further answering, state that whatever right, title or interest the said complainants, or either of them had or might have had in or to the said mining claims, called the Robert E Lee and White Oaks, respectively, prior to the year 1885, was and became wholly forfeited and lost to said complainants, respectively, by reason of their respective failure to pay or contribute any proportion of the expenditures for labor performed and improvements made upon said claims, respectively, required by law for the years 1884 and 1885, and at the expiration of the year 1885, due notice was given to said complainants respectively in the newspaper published nearest to the said claims, for at least once a week for the period of ninety days, and the said complainants respectively, at the expiration of said ninety days, after said notice by publication, wholly failed and refused to contribute any proportion of the expenditures required by law, by means whereof all interest, if any there was, of the said complainants in said mining claims hereinbefore mentioned then became forfeited and the property of the said parties who had then made the required expenditures upon the said claims, respectively.

These defendants further answering, say that they admit that in or about September 1889, the defendants Hewitt, Watson and Fergusson made applications for patents on said two lodes or claims called and known as the Robert E. Lee and White Oaks respectively and letters patent therefor of the United States had

42 been issued and that therein the said property has been conveyed to defendant, Old Abe Company, and they admit that these defendants have been for several years and now are carrying on mining operations on said two claims and have extracted therefrom large quantities of mineral bearing rock, rich in gold, and have converted the same and the proceeds thereof to their own use; but these defendants deny that the aggregate value of the same is not less then six hundred thousand dollars ($600,000.00); and deny that these defendants or either of them ever knew or had notice of the pretended rights and claims of complainants in the premises, or of the said pretended facts alleged in said bill, and deny that complainant- had or had any rights and claims in the premises as in said bill alleged, and they admit that these defendants have utterly failed, neglected and refuse to account for the proceeds of said ores or any part thereof, and deny that the said complainants or either of them are, or were entitled to the same, or any part thereof.

These defendants further answering, deny that the defendant Hewitt accepted the trust in said bill alleged, and deny that at the time of the pretended acceptance thereof, defendant Hewitt was a

man of little or no means in the receipt of a small income from the practice of his profession, and in debt to an amount exceeding the value of any property he may have had, so that he was in effect insolvent; and they admit that he is now a man of large wealth in
43 mines, banks, houses, stocks, bonds, money and other property and is the owner of the real and personal property in said bill mentioned, but they expressly deny that he acquired the same or any part thereof as the result of any violation of any duties as trustee as in and by said complainant's bill alleged, or *are* the result in any manner of his converting trust property and funds to his own use as in and by the complainant's bill alleged.

Defendants further answering, deny that the mining operations on said two lodes or claims by the defendants have been carried on in an unskillful, improper, careless and expensive manner, so that the property has been greatly injured and the extraction of ore therefrom has cost much more than it would have cost under skillful and economical management; and they deny that the defendants unless restrained by this court, will continue said mining operations in the same unskillful, improper and expensive manner, alleged in said bill, whereby the very substance of the property will be greatly wasted and destroyed, and the mines entirely ruined as in and by said bill alleged; and these defendants state that the said complainants have not, nor has either of them any interest in regard to the mining of said claims, or any title or interest in law or in equity in or to the same, or in or to the said ores and minerals in said bill mentioned.

And these defendants show unto the court that the said complainants in and by their said bill allege and set forth several and
44 distinct matters and separate interests in and to said property, and that they are improperly joined as complainants therein and these defendants claim the same benefit by reason of said misjointure as if they had demurred to the said bill.

And these defendants state that by reason of the said laches and negligence of the said plaintiffs in the premises, the said complainants, respectively, are barred from having or maintaining their said suit against the defendants, or either of them, and these defendants insist upon the said defense and claim the same benefit thereof as if they had pleaded the same in bar of said action.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged without this that there is any other matter, cause or thing in the complainants' said bill of complaint contained material or necessary for these defendants, or either of them, to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of these defendants or either of them; — of which matters and things, these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct; and pray to be

hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

WARREN, FERGUSSON & BRUNER,
Solicitors for Defendants.

45 And thereafter, to-wit, on the 31st. day of June, A. D. 1893, there was filed in the office of the clerk of said district court, in the said cause, the replication of the complainants to answer of the defendants, which replication is in the words and figures following, to-wit:

C. EWING PATTERSON ET AL.
vs.
JOHN Y. HEWITT ET AL.

In the District Court, Lincoln County, Territory of New Mexico.

The replication of C. Ewing Patterson and Henry J. Patterson, complainants, to the joint and several answer of John Y. Hewitt, William Watson, Matthew Hoyle, residents of the said county of Lincoln; Harvey B. Fergusson, resident of the county of Bernalillo, and Old Abe Company, a corporation organized under the laws of the Territory of New Mexico and having its principal place of business at White Oaks, in said county of Lincoln, defendants, to the bill of complaint of above complainants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say: That they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by these repliants; without this, that any other matter or thing
46 whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true. All of which matters and things these repliants are, and will be ready to aver and prove as this honorable court shall direct, and humbly pray, as in and by their said bill they have already prayed.

F. W. CLANCY,
Solicitor for Complainants.

And thereafter, the said cause having been referred by stipulation of counsel to Harry P. Owen as special examiner to take the proofs therein, there was filed in the office of the clerk of said district court, in said cause, a transcript of certain testimony taken by the said examiner, which transcript is in the words and figures following, to-wit:

C. EWING PATTERSON ET AL.
vs.
JOHN Y. HEWITT ET AL.

In the District Court, Lincoln County, Territory of New Mexico.

Proofs taken in the above entitled cause by Harry P. Owen, as examiner, in pursuance of stipulation of counsel on file in the office of the clerk of said court.

The taking of proofs is begun at the office of B. H. Dye, in White Oaks, New Mexico, on the 13th. day of November, 1893.

Present: Henry J. Patterson, one of complainants, and F. W. Clancy, solicitor for complainants.

Also John Y. Hewitt, one of defendants, and H. B. Fergusson, solicitor for defendants.

47 And thereafter, to-wit, on the 15th. day of February 1897, said cause having been heard by the court, the following findings and decree were made and entered by the said court in the said cause, to-wit:

In the District Court of the Fifth Judicial District in and for the County of Lincoln, Territory of New Mexico.

C. EWING PATTERSON ET AL.
vs.
JOHN Y. HEWITT ET AL.

Now on this day this cause coming on for final hearing, and the court having heard all of the testimony taken in this cause, as well for the complainants as the respondents herein, and after
48 hearing the arguments of the solicitors for the complainants and the respondents herein, and being fully advised in the premises, the court doth find from the evidence and the proofs herein:

1. That the real estate or mining ground, known as the Old Abe mining claim, in controversy in this suit was about the year 1881 claimed by the complainants herein, and by one of the defendants, Watson, under the locations made by them of said ground, sometime in the year 1881; that between that time, the year 1881 and the year 1883, the complainants, in conjunction with the said defendant, Watson, did a large amount of work upon the said ground, and were claiming the same as the locators thereof under the mining laws of the United States.

2. The court doth also find that the said ground was also at the said date, to-wit, between 1881 and 1883, claimed by other parties, among whom was the defendant, Hewitt, and others.

3. The court doth further find that some time prior to August, 1883, some rich ore had been discovered within the boundaries of said ground by one of the complainants, Patterson.

4. The court doth further find from the evidence that the said ground was, in August, 1883, in dispute between the complainants herein and the said Watson upon the one side, and the said other parties upon the other.

5. The court doth further find that the said complainants
49 and the said defendant Watson, and all of the parties who were interested in said ground, held a meeting in White Oaks in August or September, 1883, for the purpose of adjusting the difficulties then existing between them in reference to the said ground, and to endeavor if possible to arrive at an agreement whereby the interests of all parties in said ground would be protected and preserved; that at the said meeting there were present the two complainants and the defendant Watson and the defendant Hewitt, and some other persons who were interested in said ground.

6. The court doth further find, that at the said meeting it was then and there agreed by and between the complainants herein and the said defendants, William Watson and John Y. Hewitt, and the other persons who were interested in said ground, that all of the old locations then existing upon the said ground, whether made by the complainants or any of the defendants or conflicting claimants therein, should be from that date abandoned, surrendered and given up by all of the parties, and that the said ground should be taken possession of by a trustee, who should locate the said ground in his own name, and hold the same as trustee for the benefit of all the parties then interested in said ground.

7. The court doth further find that it was agreed that the said John Y. Hewitt, the defendant herein, should be and was designated and agreed upon as a trustee, with direction and authority to locate the said ground in his own name, and to hold the same as
50 trustee for all of the parties in interest; and it was further agreed by and between the said parties claiming the said ground, as well the complainants as the defendants Watson and Hewitt, and the other persons interested therein, that sufficient work should be done upon said ground in order to discover mineral upon the said ground, and to obtain a patent therefor; and it was further agreed that said Hewitt, as such trustee, should make a deed to each of the said parties holding an interest therein, who should contribute his part of the work and labor and expenses in doing the necessary work in order to obtain the said patent; but there was no agreement as to what should become of the interest of any one who failed to contribute his share of the expenses. It was also agreed that each of the said complainants should he contribute his share of expenses should receive a one-eighth interest in said location so made by said Hewitt, and that the said Watson should also receive an eighth interest, and the said Hewitt should also receive an eighth interest, partially on account of his services, and in part on account of his

interest in the ground, and that the remainder of said property should go to the other parties who were interested therein.

8. The court doth further find, that after the said agreement was made the said Hewitt took charge of said property thereunder; that the said Watson, defendant, and one of the complainants, Patterson, superintended and directed the work upon the said mine during the year 1883, and part of the year 1884.

51 9. The court doth further find, that there was a one-sixth interest in said mine which it was agreed should be sold, and which was sold to H. B. Fergusson for the sum of five hundred dollars, which sum of money was to be used and was used in the working and development of the said mine after the said promise agreement.

10. The court doth further find, that after said compromise agreement, in August or September, 1883, down to April, 1885, a large amount of work had been done upon the said property, to obtain a patent therefor, and sufficient to discover mineral thereon.

11. The court doth further find, that after said compromise agreement of August, 1883, there was contributed, either by the complainants themselves, or for them, sufficient means and labor to pay their proportionate shares of the work upon the said mine to obtain a patent and to entitle them to the deed therefor.

12. The court doth further find, that in April, 1885, the complainants herein had complied with their part of the agreement sufficiently to entitle them to a deed from the said John Y. Hewitt as such trustee, for their one-eighth interest each in and to said mine under said agreement.

13. The court doth further find, that the said W. H.(?) Patterson in person and by his agent did in April, 1885, demand a deed from the said John Y. Hewitt to his one-eighth interest in and to said mine, but that the said John Y. Hewitt, the defendant herein, declined and refused to make the said deed to the said W.

52 H.(?) Patterson for his interest therein.

14. The court doth further find, that the said Hewitt, as such trustee, has never made the said deed, but has always declined and refused to make the same, and has disputed the right of the said Patterson to his deed to the said one-eighth interest in said mine under said agreement.

15. The court doth further find, that the said C. Ewing Patterson demanded his deed to the said one-eighth interest in said Old Abe mine of and from the said Hewitt, the defendant herein, immediately prior to the date of the institution of this suit; that no demand was ever made by said C. Ewing Patterson prior thereto, but that the said Hewitt, the defendant herein, failed, neglected and refused to make, execute and deliver any deed for said interest to said C. Ewing Patterson.

16. The court doth find, that the said defendants herein, John Y. Hewitt, William Watson and H. B. Fergusson, during the years 1885, 1886, 1887, 1888 and 1889, and up to the year 1890, did and

perform- a large amount of work and expended a large amount of money on the said Old Abe mine, in addition to the annual assessment required by the Government of the United States thereon; that neither of the said complainants have ever contributed or offered to contribute any part of the said expenses of said work and labor.

17. The court doth further find, that in November, 1890, the said defendants, Watson, Fergusson, and Hewitt, discovered a
53 large body of rich ore upon the said mine, and since said date have taken out a large amount of gold ore from the said property, amounting to several hundred thousand dollars, the exact amount of which does not appear from the testimony herein.

18. The court doth further find, that about the month of —— 1892, a corporation known as the Old Abe Mining Company was organized by said Hewitt, Fergusson and Watson, and others, and that the said ground, known as the Old Abe ground in controversy herein, including the said one-eighth interest each, so claimed by said C. Ewing Patterson and said Henry Patterson, was by said Hewitt deeded to said Old Abe Mining Company, and that the said mining company is now claiming title hereto, and that the stock of said company was divided so that Hewitt held ¼, said Watson ¼, said Fergusson ¼, and 1–48 each to four Wheeling parties, associated with Mr. Fergusson in his original purchase of 1–6 of the property, and the capital stock remained so divided at least down to the time of the taking of defendants' testimony in this case in January 1896.

19. The court doth further find, that the said C. Ewing Patterson left the Territory of New Mexico and removed to the State of New Jersey in the year 1892, (?) and has never since returned nor resided in this Territory.

20. The court doth further find, that the said Henry Patterson left White Oaks, New Mexico, about the latter part of March,
54 1885, and that after that time to the fall of 1892 he was a non-resident of this Territory, living in California, Arizona, and other places on the Pacific coast.

21. The court doth further find, that since the said Henry Patterson left this Territory, in April, 1885, neither he nor the said C. Ewing Patterson have in any way or manner contributed any means or labor for the development or improvement of said mine, and had taken no steps whatever, prior to the bringing of this suit, to enforce their rights or interests in said property, or to require the said Hewitt to carry out his agreement of August and September, 1883. That from April, 1885, to a short time prior to the date of the institution of this suit, in 1893, the said Henry Patterson and C. Ewing Patterson were both out of this Territory, and took apparently no interest in said property, and made no effort in any way to enforce their rights thereunder until the date of the institution of this suit.

22. The court doth further find, that the said Henry Patterson through his agent, Henry Burgess, had knowledge that the said defendant, Hewitt, had declined, neglected and refused to carry out

the said agreement and make to him and his co-complainant deeds to the interests which they claimed in and to said mine; that he had such notice, first, in April, 1885, and that he had such notice again in the summer of 1887, and that he, with his co-complainant,
C. Ewing Patterson, through information received, were fully
55 advised after April 1885, that the said Hewitt had refused to make said deed or carry out said trust agreement.

23. The court doth therefore find, as a conclusion from the proofs and evidence in this case, and the facts established that the complainants herein are barred from any right of recovery in this cause, and the bill herein should be dismissed.

In accordance with the above and foregoing findings it is therefore ordered, adjudged and decreed by the court that said bill of said complainants be, and the same is hereby, dismissed and that the complainants take nothing by their writ, and that each party pay half the costs of this cause to be taxed against them and that execution issue therefor.

H. B. HAMILTON, *Judge, etc.*

And thereafter, on the 21st. day of December, 1897, there was made and entered of record in said district court an order granting an appeal in the said cause, which order is in the words and figures following, to-wit:

C. EWING PATTERSON ET AL.
vs.
JOHN Y. HEWITT ET AL. } No. 905.

This cause coming on to be heard on the motion of complainants, for an appeal to the supreme court of the Territory of New Mexico, from the judgment of the court here in this cause, and said
56 motion being by the court heard, and the court being fully advised, and on consideration thereof, doth sustain the said motion, and it is ordered by the court that the said complainants do have an appeal unto the supreme court of the Territory of New Mexico, from the judgment of the court here in this cause.

H. B. HAMILTON, *Judge, etc.*

TERRITORY OF NEW MEXICO, }
Fifth Judicial District. }

I, W. M. Driscoll, clerk of the district court of the fifth judicial district of the Territory of New Mexico, do hereby certify that the above and foregoing contains a full, true, and correct copy and transcript of the pleadings and proceedings had in a cause lately pending in the said district court within and for the county of Lincoln, wherein C. Ewing Patterson, *et al.* were complainants and John Y. Hewitt *et al.* were defendants, as the same remain of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the said district court, at my office in Socorro New Mexico, this 30th. day of June, A. D. 1898.

[SEAL.] W. M. DRISCOLL, *Clerk.*

57 And afterwards, on to wit the 25th day of July A. D., 1898, there was filed in the office of the said clerk of the supreme court of the Territory of New Mexico, an assignment of errors, which said assignment of errors was and is in words and figures, as follows to-wit

In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1898.

C. EWING PATTERSON ET AL., Appellants, vs. JOHN Y. HEWITT ET AL., Appellees. } No. 802. Appeal from District Court, Lincoln County.

Now comes the appellants by their attorneys, and say that there is manifest error in record, proceedings and decree in this cause, in the court below, and specify the following as assignments of errors therein:

1. The court erred in finding that the compromise agreement of 1883, contemplated the doing of work on the ground in controversy "in order to discover mineral upon the said ground."

2. The court erred in finding that neither of the complainants have ever contributed or offered to contribute any part of the expense of the work done by Hewitt, Watson and Fergusson during the years 1885 to 1890.

3. The court erred in failing to find that complainants were never called upon to contribute to the work done from 1885 to 1890.

4. The court erred in failing to find that no legal obligation rested upon complainants to contribute to the expense of the work done from 1885 to 1890.

5. The court erred in finding that from April, 1885 to 1893 complainants "took apparently no interest in said property."

58 6. The court erred in finding that Henry Patterson had knowledge through his agent, Burgess, that Hewitt had neglected, declined and refused to carry out his agreement, and that he, with his co-complainant, was fully advised, after April 1885, that Hewitt had refused to carry out said agreement.

7. The court erred in finding that C. Ewing Patterson was advised after April, 1885, that Hewitt refused to make a deed or carry out said trust agreement.

8. The court erred in finding as a conclusion from the proofs that complainants are barred from any right of recovery, and in dismissing the bill.

Wherefore, appellants pray that the decree of the court below, be reversed, and that this cause be remanded with directions to enter a decree in favor of complainants establishing their respective rights to an undivided one eighth interest each in the property in controversy, and to take an account of what may be due to them from defendants or any or either of them for their shares of the profits of the said property, or that this court may enter *said* decree as to it shall seem proper and equity may require.

WM. B. CHILDERS,
F. W. CLANCY,
Attorneys for Appellants.

The appellees for joinder in error herein say that in the record proceedings and decree in this cause in the court below, there is no error as by said appellants alleged.

WARREN & FERGUSSON,
Attorneys for Appellees.

Which said assignment of errors was and is endorsed as follows to wit:

No. 802 In the supreme court of the Territory of New
59 Mexico Patterson *et al. vs.* Hewitt *et al.*, Assignment of
errors Filed in my office this July 25, 1898 Geo. L. Wyllys, clerk.

And afterwards, on to wit—the eight day of February, A. D., 1899, there was filed in the office of the clerk of the supreme court of the Territory a stipulation of counsel which said stipulation was and is in words and figures, following to wit:—

In the Supreme Court of the Territory of New Mexico, July Term, A. D. 1898.

C. EWING PATTERSON ET AL., Appellants, vs. JOHN Y. HEWITT ET AL., Appellees. } No. 802. Appeal from District Court, Lincoln County.

It is hereby stipulated and agreed by and between the parties to this cause which has been set for hearing at the adjourned term of the Supreme Court beginning on February 20th, 1899, that the argument thereof may be postponed until the first meeting of the court which may be held after the 10th of March, 1899 and at which the court will hear any cases.

WM. B. CHILDERS,
F. W. CLANCY,
Attorneys for Appellants.
WARREN & FERGUSSON,
Attorneys for Appellees.

February 1st, 1899.

60 Which said stipulation is endorsed as follows:

802. In the supreme court Territory of New Mexico. C. Ewing Patterson *et al. vs.* John Y. Hewitt, *et al.* Stipulation for continuance. Filed in my office this Feb. 8, 1899, Jose D. Sena, clerk.

And afterwards, on to wit: at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, the seat of government, on the last Monday of July, the same being the 25th day of July, A. D., 1898 on the forty-third day of said regular term, the same being Wednesday the 5th day of July, A. D., 1899, the following among other proceedings, were had and entered of record viz:—

C. EWING PATTERSON ET AL., Appellants, vs. JOHN Y. HEWITT ET AL., Appellees. } No. 802. Appeal from District Court, Lincoln County.

It is ordered by the court that this cause be and the same is hereby set for hearing for the 28th day of August, A. D., 1899.

And afterwards on to wit, on the forty-fourth day of the said regular term, the same being Monday the 28th day of August, A. D., 1899, the following among other proceedings were had and entered of record, viz:—

C. EWING PATTERSON ET AL., Appellants, vs. JOHN Y. HEWITT ET AL., Appellees. } No. 802. Appeal from District Court, Lincoln County.

61 This cause coming on to be heard upon the transcript of record, assignment of errors and briefs of counsel, is partly argued by F. W. Clancy, Esq. for appellants and the argument herein not being concluded, this cause is hereby continued until tomorrow morning at ten o'clock a. m.

And afterwards, at the said regular term, on to wit the forty-fifth day thereof, the same being Tuesday the 29th day of August, A. D. 1899 the following among other proceedings were had and entered of record viz:—

C. EWING PATTERSON ET AL., Appellants, vs. JOHN Y. HEWITT ET AL., Appellees. } No. 802. Appeal from District Court, Lincoln County.

This cause again coming on to be heard upon the transcript of record, assignment of errors, and briefs of counsel, was further argued by F. W. Clancy, Esq. and William B. Childers, Esq. for appellants, and H. B. Fergusson, Esq. for appellees, and submitted

to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, on to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, the seat of government, on the first Wednesday after the first Monday in January the same being Wednesday January the 9th, A. D. 1901, on the twenty-seventh day of the said regular term, the same being Thursday February the 28th A. D. 1901 the following among other proceedings, were had and entered of record viz:—

61½ C. EWING PATTERSON ET AL., Appellants, vs. JOHN Y. HEWITT ET AL., Appellees. } No. 802. Appeal from District Court, Lincoln County.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of the present term, and the court having has the same under advisement, and being now sufficiently advised in the premises, announces its decision by Associate Justice McFie, Chief Justice Mills, and Associate Justices Parker and Crumpacker, concur-ing, affirming the judgment of the lower court for reasons stated in the opinion of the court on file, It is therefore considered and adjudged by the court that the judgment of the district court in and for the county of Lincoln, whence this cause came into this court, be, and the same hereby is affirmed, and that in accordance therewith, it is considered and adjudged by the court, that said bill of complaint, be, and the same is hereby dismissed and that the complainants take nothing by their writ and that each party pay half of the costs in this cause to be taxed against them and that execution issue therefor, and it is further ordered adjudged and decreed that the said appellee do have and recover of the said appellant his costs in this behalf expended in this court, to be taxed for which execution may issue, and it is so ordered.

62 And the said findings of the district court, adopted by the supreme court of the Territory of New Mexico, as its findings of fact for the purpose of any appeal herein, are in words and figures following to-wit:

63 1. That the real estate or mining ground, known as the Old Abe mining claim, in controversy in this suit was about the year 1881 claimed by the complainants herein, and by one of the defendants, Watson, under the locations made by them of said ground, sometime in the year 1881; that between that time, the year 1881 and the year 1883, the complainants, in conjunction with the said defendant, Watson, did a large amount of work upon the said ground, and were claiming the same as the locators thereof under the mining laws of the United States.

2. The court doth also find that the said ground was also at the said date, to-wit, between 1881 and 1883, claimed by other parties, among whom was the defendant, Hewitt, and others.

3. The court doth further find that some time prior to August, 1883, some rich ore had been discovered within the boundaries of said ground by one of the complainants, Patterson.

4. The court doth further find from the evidence that the said ground was, in August, 1883, in dispute between the complainants herein and the said Watson upon the one side, and the said other parties upon the other.

5. The court doth further find that the said complainants
64 and the said defendant Watson, and all of the parties who were interested in said ground, held a meeting in White Oaks in August or September, 1883, for the purpose of adjusting the difficulties then existing between them in reference to the said ground, and to endeavor if possible to arrive at an agreement whereby the interests of all parties in said ground would be protected and preserved; that at the said meeting there were present the two complainants and the defendant Watson and the defendant Hewitt, and some other persons who were interested in said ground.

6. The court doth further find, that at the said meeting it was then and there agreed by and between the complainants herein and the said defendants, William Watson and John Y. Hewitt, and the other persons who were interested in said ground, that all of the old locations then existing upon the said ground, whether made by the complainants or any of the defendants or conflicting claimants therein, should be from that date abandoned, surrendered and given up by all of the parties, and that the said ground should be taken possession of by a trustee, who should locate the said ground in his own name, and hold the same as trustee for the benefit of all the parties then interested in said ground.

7. The court doth further find that it was agreed that the said John Y. Hewitt, the defendant herein, should be and was designated and agreed upon as a trustee, with direction and authority to locate
65 the said ground in his own name, and to hold the same as trustee for all of the parties in interest; and it was further agreed by and between the said parties claiming the said ground, as well the complainants as the defendants Watson and Hewitt, and the other persons interested therein, that sufficient work should be done upon said ground in order to discover mineral upon the said ground, and to obtain a patent therefor; and it was further agreed that said Hewitt, as such trustee, should make a deed to each of the said parties holding an interest therein, who should contribute his part of the work and labor and expenses in doing the necessary work in order to obtain the said patent; but there was no agreement as to what should become of the interest of any one who failed to contribute his share of the expenses. It was also agreed that each of the said complainants should he contribute his share of expenses should receive a one-eighth interest in said location so

made by said Hewitt, and that the said Watson should also receive an eighth interest, and the said Hewitt should also receive an eighth interest, partially on account of his services, and in part on account of his interest in the ground, and that the remainder of said property should go to the other parties who were interested therein.

8. The court doth further find, that after the said agreement was made the said Hewitt took charge of said property thereunder; that the said Watson, defendant, and one of the complainants, Patterson, superintended and directed the work upon the said mine during the year 1883 and part of the year 1884.

66 9. The court doth further find, that there was a one-sixth interest in said mine which it was agreed should be sold, and which was sold to H. B. Fergusson for the sum of five hundred dollars, which sum of money was to be used and was used in the working and development of the said mine after the said compromise agreement.

10. The court doth further find, that after said compromise agreement, in August or September, 1883, down to April, 1885, a large amount of work had been done upon the said property, to obtain a patent therefor, and sufficient to discover mineral thereon.

11. The court doth further find, that after said compromise agreement of August, 1883, there was contributed, either by the complainants themselves, or for them, sufficient means and labor to pay their proportionate shares of the work upon the said mine to obtain a patent and to entitle them to the deed therefor.

12. The court doth further find, that in April, 1885, the complainants herein had complied with their part of the agreement sufficiently to entitle them to a deed from the said John Y. Hewitt, as such trustee, for their one-eighth interest each in and to said mine under said agreement.

13. The court doth further find, that the said W. H. (?) Patterson in person and by his agent did in April, 1885, demand a deed from the said John Y. Hewitt to his one-eighth interest in and to said mine, but that the said John Y. Hewitt, the defendant herein, declined and refused to make the said deed to the said W.

67 H. (?) Patterson for his interest therein.

14. The court doth further find, that the said Hewitt, as such trustee, has never made the said deed, but has always declined and refused to make the same, and has disputed the right of the said Patterson to his deed to the said one-eighth interest in said mine under said agreement.

15. The court doth further find, that the said C. Ewing Patterson demanded his deed to the said one-eighth interest in said Old Abe mine of and from the said Hewitt, the defendant herein, immediately prior to the date of the institution of this suit; that no demand was ever made by said C. Ewing Patterson prior thereto, but that the said Hewitt, the defendant herein, failed, neglected and refused

to make, execute and deliver any deed for said interest to said C. Ewing Patterson.

16. The court doth find, that the said defendants herein, John Y. Hewitt, William Watson and H. B. Fergusson, during the years 1885, 1886, 1887, 1388 and 1889, and up to the year 1890, did and perform- a large amount of work and expended a large amount of money on the said Old Abe mine, in addition to the annual assessment required by the Government of the United States thereon; that neither of the said complainants have ever contributed or offered to contribute any part of the said expenses of said work and labor.

17. The court doth further find, that in November, 1890, the said defendants, Watson, Fergusson, and Hewitt, discovered a large body of rich ore upon the said mine, and since said date have taken
68 out a large amount of gold ore from the said property, amounting to several hundred thousand dollars, the exact amount of which does not appear from the testimony herein.

18. The court doth further find, that about the month of —— 1892, a corporation known as the Old Abe Mining Company was organized by said Hewitt, Fergusson and Watson, and others, and that the said ground, known as the Old Abe ground in controversy herein, including the said one-eighth interest each, so claimed by said C. Ewing Patterson and said Henry Patterson, was by said Hewitt deeded to said Old Abe Mining Company, and that the said mining company is now claiming title hereto, and that the stock of said company was divided so that Hewitt held ¼, said Watson ¼, said Fergusson ¼, and 1-48 each to four Wheeling parties, associated with Mr. Fergusson in his original purchase of ¼ of the property, and the capital stock remained so divided at least down to the time of the taking of defendants' testimony in this case in January 1896.

19. The court doth further find, that the said C. Ewing Patterson left the Territory of New Mexico and removed to the State of New Jersey in the year 1892, (?) and has never since returned nor resided in this Territory.

20. The court doth further find, that the said Henry Patterson left White Oaks, New Mexico, about the latter part of March,
69 1885, and that after that time to the fall of 1892 he was a non-resident of this Territory, living in California, Arizona, and other places on the Pacific coast.

21. The court doth further find, that since the said Henry Patterson left this Territory, in April, 1885, neither he nor the said C. Ewing Patterson have in any way or manner contributed any means or labor for the development or improvement of said mine, and had taken no steps whatever, prior to the bringing of this suit, to enforce their rights or interests in said property, or to require the said Hewitt to carry out his agreement of August and September, 1883. That from April, 1885, to a short time prior to the date of the institution of this suit, in 1893, the said Henry Patterson and C. Ewing Patterson were both out of this Territory, and took apparently no in-

terest in said property, and made no effort in any way to enforce their rights thereunder until the date of the institution of this suit.

22. The court doth further find, that the said Henry Patterson through his agent, Henry Burgess, had knowledge that the said defendant, Hewitt, had declined, neglected and refused to carry out the said agreement and make to him and his co-complainant deeds to the interests which they claim in and to said mine; that he had such notice, first, in April, 1885, and that he had such notice again in the summer of 1887, and that he, with his co-complainant, C. Ewing Patterson, through information received, were fully
69½ advised after April, 1885, that the said Hewitt had refused to make said deed or carry out said trust agreement.

23. The court doth therefore find, as a conclusion from the proofs and evidence in this case, and the facts established that the complainants herein are barred from any right of recovery in this cause, and the bill herein should be dismissed.

In accordance with the above and foregoing findings it is therefore ordered, adjudged and decreed by the court that said bill of said complainants be, and the same is hereby, dismissed and that the complainants take nothing by their writ, and that each party pay half the costs of this cause to be taxed against them and that execution issue therefor.

H. B. HAMILTON, *Judge, etc.*

70 And afterwards, on to wit: the 6th day of January A. D., 1903, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, an affidavit of value which said affidavit of value is in words and figures as follows to-wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1903.

C. EWING PATTERSON ET AL., Appellants,
vs.
JOHN Y. HEWITT ET ALS., Appellees. } No. 802.

Affidavit of Amount Involved.

TERRITORY OF NEW MEXICO,
County of Bernalillo, } ss:

William B. Childers, of lawful age, being duly sworn, upon oath deposes and says:

That he is one of the attorneys for the appellants in the above entitled cause; that he is well acquainted with the property involved in said suit, to-wit, the Old Abe mine in the White Oaks mining district, county of Lincoln, New Mexico, and that the interests in question and the subject matter of this litigation exceeds in value and is in excess of the sum of five thousand dollars.

(Signed) WILLIAM B. CHILDERS.

Subscribed and sworn to before me this the 2nd day of February, A. D., 1903.

(Signed) E. L. MEDLER,
[SEAL.] *Notary Public.*

71 And afterwards, on to wit on the 6th day of February A. D., 1903, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, a motion for allowance of appeal, and an order granting the same, which said motion for allowance of appeal and order allowing the same was and is in words and figures, following to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1903.

C. EWING PATTERSON ET ALS., Appellants,
vs.
JOHN Y. HEWITT ET ALS., Appellees. } No. 802.

Motion for Allowance of Appeal.

Now comes the appellant- in the above entitled cause, by their attorneys Frank W. Clancy, and Wm. B. Childers, and pray the court to grant them an appeal from the judgment and decree of this court rendered in the above entitled cause, on the 28th day of February, 1901, from this court to the Supreme Court of the United States.

(Signed) F. W. CLANCY,
WM. B. CHILDERS,
Attorneys for Appellants.

Order Allowing Appeal.

This cause coming on be heard upon the above petition of the appellants, it is ordered and decreed that the said appellants be and they are hereby granted an appeal from the judgment and decree of this court, in the above entitled cause, to the Supreme Court of the United States.

(Signed) WILLIAM J. MILLS,
Chief Justice, &c.

72 Which said motion and order were endorsed as follows, to-wit:

No. 802 In the supreme court of the Territory of New Mexico C. Ewing Patterson, *et als.*, appellants, *vs.* John Y. Hewitt, *et als.*, appellees Motion praying an appeal to the Supreme Court of the United States, and order allowing the same, and affidavit of value. Filed in my office, this Feb. 6th, 1903 Jose D. Sena, clerk.

And afterwards, on to-wit, in vacation, the following order allowing appeal, was made and entered of record, viz:—

C. EWING PATTERSON ET ALS., Appellants,
vs.
JOHN Y. HEWITT ET ALS., Appellees.
} No. 802. Appeal from District Court, Lincoln County.

This cause coming on to be heard on the above petition of appellants, it is ordered and decreed that the said appellants be and they are hereby granted an appeal from the judgment and decree of this court, in the above entitled cause, to the Supreme Court of the United States.

(Signed) WILLIAM J. MILLS,
Chief Justice.

And afterwards, on to wit, on the 28th day of February, A. D., 1901, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, an opinion by the court in the above entitled cause, which said opinion of the court is in words and figures following to-wit:—

73 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1901.

C. EWING PATTERSON ET AL., Appellants,
vs.
JOHN Y. HEWITT ET AL., Appellees.
} No. 802. Appeal from District Court, Lincoln County.

Syllabus.

1. Where claimants of conflicting mining claims, enter into a verbal agreement by the terms of which all of their former locations should be abandoned; that certain new locations should be made in the name of one of the parties, on condition that each of the parties shall perform their *pro-rata* share of the work necessary to make and maintain such new locations and procure patents for the same; one of the parties left the Territory in 1883, prior to the performance of his share of the labor required, leaving agents to represent him, and another left the Territory in 1885, after such work was performed and a demand for deed was made, leaving agent who also made demand for deed, which was refused; in the absence of these non-residents, the other claimants performing their *pro-rata* share of the labor required, and other parties, contributed large sums of money, and performed a large amount of labor for several years, for the development of the claims—which were of purely speculative value when the non-resident claimants left the Territory—the result of which was the dis-

covery and extraction of large quantities of valuable ores, and in great enhancement in the value of the property in the year 1890 and subsequent years, to the accomplishment of which results, neither the non-resident claimants nor their
74 agents contributed either money labor, or in any manner whatever. April 23rd 1893, said non-resident claimants C. Ewing Patterson and Henry J. Patterson, brought suit to recover a one-fourth interest in said mining claims, and also for an accounting for money received from ores taken therefrom, and for the enforcement of a trust, alleging performance of labor and demand for deed prior to the departure of Henry J. Patterson in April, 1885, and also the failure and refusal of John Y. Hewitt who made the locations, to execute and deliver deeds etc. Held: that under the circumstances of this case, the complainants were guilty of laches in equity, in failing to institute proceedings to enforce alleged rights accruing eight years prior to the commencement of suit, and that a court of equity will not aid in the enforcement of stale claims, where the circumstances show that the enforcement would be inequitable.

2. Where a case is of purely equitable cognizance, in the application of the doctrine of laches, courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, antiquated demands, and refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights.

3. In such case, the statute of limitations does not necessarily govern the court in the application of laches.

4. Sections 2916 and 2930 Comp. Laws, 1897, applies limitation to trusts founded upon verbal agreements or unwritten contracts, where the defendant has not fraudulently concealed his cause of action or the existence thereof, from the party entitled or having a right thereto, and there was no such concealment in this case.

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C. EWING PATTERSON ET AL., Appellants, vs. JOHN Y. HEWITT ET AL., Appellees. } No. 802. Appeal from District Court, Lincoln County.

Statement of Facts.

This case was begun on the 29th of April, 1893, in the district court for Lincoln county, by the filing of a bill of complaint on behalf of C. Ewing Patterson, a resident of New Jersey, and Henry J. Patterson, a resident of New Mexico, against John Y. Hewitt, Wil-

liam Watson, Mathew Hoyle and Harvey B. Fergusson, residents of New Mexico, and Old Abe Company, a New Mexico corporation.

The appellants sue to enforce a trust which is alleged to have existed between the appellants and Hewitt, and by virtue of which they seek to recover a one-fourth interest in two mining locations made in the name of John Y. Hewitt on the 2nd day of May 1884; they also pray for an accounting of the proceeds of ores taken from the premises, for a lien upon the property, for an injunction and the appointment of a receiver.

The court at the conclusion of the testimony and the arguments of counsel made numerous findings of fact and conclusions of law, and upon the 15th day of February, 1897, rendered a final decree dismissing appellant's bill at their cost. Appellants prayed an appeal which was granted and brought the case to this court.

The facts as found by the court are:

"1. That the real estate or mining ground, known as the Old Abe mining claim, in controversy in this suit was about the year 1881 claimed by the complainants herein, and by one of the defendants, Watson, under the locations made by them of said ground,
76 sometime in the year 1881; that between that time, the year 1881 and the year 1883, the complainants, in conjunction with the said defendant, Watson, did a large amount of work upon the said ground, and were claiming the same as the locators thereof under the mining laws of the United States.

2. The court doth also find that the said ground was also at the said date, to-wit, between 1881 and 1883, claimed by other parties, among whom was the defendant, Hewitt, and others.

3. The court doth further find that some time prior to August, 1883, some rich ore had been discovered within the boundaries of said ground by one of the complainants, Patterson.

4. The court doth further find from the evidence that the said ground was, in August, 1883, in dispute between the complainants and the said Watson upon the one side, and the said other parties upon the other.

5. The court doth further find that the said complainants and the said defendant Watson, and all of the parties who were interested in said ground, held a meeting in White Oaks in August or September, 1883, for the purpose of adjusting the difficulties then existing between them in reference to the said ground, and to endeavor if possible to arrive at an agreement whereby the interest of all parties in said ground would be protected and preserved; that at the said meeting there were present the two complainants and the defendant Watson and the defendant Hewitt, and some other persons who were interested in said ground.

6. The court doth further find, that at the said meeting it was then and there agreed by and between the complainants herein and the said defendants, William Watson and John Y. Hewitt, and the other persons who were interested in said ground, that all of the old locations then existing upon the said ground, whether made by

the complainants or any of the defendants or conflicting claimants therein, should be from that date abandoned, surrendered and given up by all of the parties, and that the said ground should be taken possession of by a trustee, who should locate the said ground
77 in his own name, and hold the same as trustee for the benefit of all the parties then interested in said ground.

7. The court doth further find, that it was agreed that the said John Y. Hewitt, the defendant herein, should be and was designated and agreed upon as a trustee, with direction and authority to locate the said ground in his own name, and to hold the same as trustee for all of the parties in interest; and it was further agreed by and between the said parties claiming the said ground, as well the complainant- as the defendants Watson and Hewitt, and the other persons interested therein, that sufficient work should be done upon said ground in order to discover mineral upon the said ground, and to obtain a patent therefor; and it was further agreed that said Hewitt, as such trustee, should make a deed to each of the said parties holding an interest therein, who should contribute his part of the work and labor and expenses in doing the necessary work in order to obtain the said patent; but there was no agreement as to what should become of the interest of any one who failed to contribute his share of the expenses. It was also agreed that each of the said complainants should he contribute his share of expenses should receive a one-eighth interest in said location so made by said Hewitt; and that the said Watson should also receive an eighth interest, and the said Hewitt should receive an eighth interest, partially on account of his services, and in part on account of his interest in the ground, and that the remainder of said property should go to the other parties who were interested therein.

8. The court doth further find, that after the said agreement was made the said Hewitt took charge of said property thereunder; that the said Watson, defendant, and one of the complainants, Patterson, superintended and directed the work upon the said mine during the year 1883, and part of the year 1884.

9. The court doth further find, that there was a one-sixth interest in said mine which it was agreed should be sold, and which was sold to H. B. Fergusson for the sum of five hundred dollars,
78 which sum of money was to be used and was used in the working and development of the said mine after the said compromise agreement.

10. The court doth further find, that after said compromise agreement, in August or September, 1883, down to April, 1885, a large amount of work had been done upon the said property, to obtain a patent therefor, and sufficient to discover mineral thereon.

11. The court doth further find, that after said compromise agreement of August, 1883, there was contributed, either by the complainants themselves, or for them sufficient means and labor to pay their proportionate shares of the work upon the said mine to obtain a patent and to entitle them to the deed therefor.

12. The court doth further find, that in April, 1885, the complainants herein had complied with their part of the agreement sufficiently to entitle them to a deed from the said John Y. Hewitt, as such trustee, for their one-eighth interest each in and to said mine under said agreement.

13. The court doth further find, that the said Henry J. Patterson in person and by his agent did in April, 1885, demand a deed from the said John Y. Hewitt to his one-eighth interest in and to said mine, but that the said John Y. Hewitt, the defendant herein declined and refused to make the said deed to the said Henry J. Patterson, for his interest therein.

14. The court doth further find, that the said Hewitt, as such trustee, has never made the said deed, but has always declined and refused to make the same, and has disputed the right of the said Patterson to his deed to the said one-eighth interest in said mine under said agreement.

15. The court doth further find, that the said C. Ewing Patterson demanded his deed to the said one-eighth interest in said Old Abe mine of and from the said Hewitt, the defendant herein, immediately prior to the date of the institution of this suit; that no demand was ever made by the said C. Ewing Patterson prior thereto, but that the said Hewitt, the defendant herein, failed,
79 neglected and refused to make, execute and deliver any deed for said interest to said C. Ewing Patterson.

16. The court doth further find, that the said defendants herein, John Y. Hewitt, William Watson and H. B. Fergusson, during the years 1885, 1886, 1887, 1888, and 1889, and up to the year 1890, did and performed a large amount of work and expended a large amount of money on the said Old Abe mine, in addition to the annual assessment required by the Government of the United States thereon; that neither of the said complainants have ever contributed or offered to contribute any part of the said expenses of said work and labor.

17. The court doth further find, that in November, 1890, the said defendants, Watson, Fergusson, and Hewitt, discovered a large body of rich ore upon the said mine, and since said date have taken out a large amount of gold ore from the said property, amounting to several hundred thousand dollars, the exact amount of which does not appear from the testimony herein.

18. The court doth further find, that about the month of ——, 1892, a corporation known as the Old Abe Mining Company was organized by said Hewitt, Fergusson, and Watson, and others, and that the said ground, known as the Old Abe ground in controversy herein, including the said one-eighth interest each, so claimed by said C. Ewing Patterson and said Henry Patterson, was by said Hewitt deeded to said Old Abe Mining Company and that the said mining company is now claiming title thereto, and that the stock of said company was divided so that Hewitt held ⅓, said Watson ⅓, said Fergusson ⅓, and 1/48 each to four Wheeling parties, associated with Mr. Fergusson in his original purchase of 1/6

of the property, and the capital stock remained so divided at least down to the time of the taking of defendant's testimony in this case in January, 1896.

19. The court doth further find, that the said C. Ewing Patterson left the Territory of New Mexico and removed to the State of New Jersey in the year 1883 and has never since returned nor resided in this Territory.

80 20. The court doth further find, that the said Henry Patterson left White Oaks, New Mexico, about the latter part of March, (April) 1885, and that after that time to the fall of 1892, he was a non-resident of this Territory, living in California, Arizona, and other places on the Pacific coast.

21. The court doth further find, that since the said Henry Petterson left this Territory, in April, 1885, neither he nor the said C. Ewing Patterson have in any way or manner contributed any means or labor for the development or improvement of said mine, and had taken no steps whatever, prior to the bringing of this suit, to enforce their rights or interests in said property, or to require the said Hewitt to carry out his agreement of August and September, 1883. That from April, 1885, to a short time prior to the date of the institution of this suit, in 1893, the said Henry Patterson and C. Ewing Patterson were both out of this Territory, and took apparently no interest in said property, and made no effort in any way to enforce their rights thereunder until the date of the institution of this suit.

22. The court doth further find, that the said Henry Patterson through his agent, Henry Burgess, had knowledge that the said defendant, Hewitt, had declined, neglected and refused to carry out the said agreement and make to him and his co-complainant deeds to the interests which they claimed in and to said mine; that he had such notice first, in April, 1885, and that he had such notice again in the summer of 1887, and that he, with his co-complainant, C. Ewing Patterson, through information received, were fully advised after April, 1885, that the said Hewitt had refused to make said deed or carry out said trust agreement.

23. The court doth therefore find, as a conclusion from the proofs and evidence in this case, and the facts established that the complainants herein are barred from any right of recovery in this cause, and the bill herein should be dismissed.

In accordance with the above and foregoing findings it is therefore ordered, adjudged and decreed by the court that said bill
81 of said complainants — take nothing by their writ, and that each party pay half the costs of this cause to be taxed against them and that execution issue therefor."

Opinion of the Court.

McFIE, *J.*:

The court below dismissed the bill no doubt upon the ground that the appellants were without a remedy in a court of equity under the well known and frequently applied doctrine of laches, and want of equity in appellants' bill. This is apparent not only from the decree of the court, but from the arguments of counsel in their briefs. Counsel for the appellants insist, first, that the doctrine of laches as applied by courts of equity, is not applicable to this case, and, second, that if the doctrine of laches is available as a defense in this action at all, the delay must have been for the full period of the statute of limitations applicable to actions relating to real estate, which appellants insist is ten years. Counsel for appellees plant themselves squarely upon the equitable doctrine of laches as a complete defense to this action, and that the application of the same is not controlled by the statute of limitations. They also insist, that if a trust relation existed between Hewitt and the appellants, and appellants are seeking to enforce rights acquired by them under such trust relations, the appellants are barred both by the statute of frauds and sections 2916 and 2930 of the Statute of Limitations, for the reason that if the trust relation existed at all, it was by virtue of an unwritten contract or agreement. These are substantially the grounds upon which a reversal of this case is sought by the appellants, or an affirmance by the appellees.

Counsel on both sides in their briefs criticize some of the findings of fact by the court below, upon the ground that there is no substantial evidence to sustain the findings, but it is to be inferred at least from the remarks of counsel on that subject, that these criticisms are not made with a hope of having this court disregard the findings of fact by the court below; and it is substantially stated by counsel on both sides that it is expected that this court will decide
82 this case upon the facts as found by the court below, and that counsel are satisfied that the court shall do so.

There was a large amount of testimony taken in this case, and the same has been examined by the court. From this examination there is a substantial conflict in the evidence on the controverted points in the case, and such being the case, this court will abide by the findings of the trial court upon the questions of fact and determine the case upon the facts thus presented by the record.

Before proceeding to an examination of the law upon this issue, a brief summary of the facts will be appropriate.

The material facts as found by the court and which are pertinent to the issue of laches, are, that the agreement entered into at the meeting held in August or September, 1883, by which Hewitt was to locate the mining claims known as "The White Oaks" and "Robert E. Lee" lodes, and which were also denominated "The

Old Abe" by the court below in his findings, and at which meeting the interests of the respective parties were agreed upon, was a parol or unwritten contract or agreement, and that no written contract or agreement was entered into between the parties for this purpose at any time; that Hewitt located these claims in his own name on the 2nd day of May, 1884; that C. Ewing Patterson removed from the Territory of New Mexico to the State of New Jersey in December, 1883, and never returned to the Territory; that the work which it was agreed at that meeting should be done by the respective parties, was done by or under the supervision of Henry J. Patterson and William Watson after the date of that meeting and up to April, 1885, and if any labor was performed on behalf of C. Ewing Patterson during that time, it was by or under the direction of Henry J. Patterson and Watson, as his representatives; that demand was made upon Hewitt for the execution of deeds conveying the interests of the Pattersons in said property to them as early as April, 1885, and that both of the appellants were fully advised and informed, and, therefore, knew that Hewitt refused to convey to them any interest in said property as early as April, 1885; that Henry J. Patterson left the Territory of
83 New Mexico in April, 1885, residing in Arizona, California and other places and did not return until 1892; that Hewitt never did convey to either of the appellants any interest in the property in controversy, but on the contrary openly refused to do so, both to the Pattersons themselves and to Mr. Burgess, the attorney-in-fact of Henry J. Patterson, and that both of the Pattersons had knowledge of the refusal of Hewitt to convey as early as April, 1885; that a large amount of work and labor was done upon the property in controversy in the nature of assessment and development work and for the improvement of the property by appellees Hewitt, Fergusson and Watson during the years 1885, 1886, 1887, 1888, 1889, and 1890, and a large amount of money was expended by them upon this property during those years, all of which labor and money was done or expended by themselves and others owning interests therein, and that neither Henry J. Patterson nor C. Ewing Patterson performed any labor or expended any money upon or contributed in any way to the labor and expense of Hewitt, Watson and Fergusson during those years in the nature of assessment work required by the Government or otherwise, or at any time after April, 1885, nor did they or either of them manifest any interest whatever in the property after Henry J. Patterson left the Territory in April, 1885, nor did the defendant, Burgess, attorney-in-fact, who resided in the immediate vicinity of the property, perform any labor or contribute any money towards the assessment work or the development of the property in the absence of the Pattersons; that the property was of little known value, but on the contrary its value prior to the year 1890 was entirely uncertain and speculative; that during the fall of 1890 the development work done by Hewitt, Watson and Fergusson and others, not including the appellants re-

sulted in the discovery of large bodies of rich ores in the mines located by Hewitt and referred to as "The Old Abe" mine; that the property at that time rapidly advanced in value and became of great certain value, and that several hundred thousand dollars' worth of valuable ores were taken from the property by the parties developing the same; that in ——, 1892, a mining company was organized by Hewitt, Watson, Fergusson and others and
84 incorporated in the name of "The Old Abe Mining Company;" that Hewitt, Watson, Fergusson and others conveyed their respective interests in the property in controversy to the company, and that stock was issued by said company in lieu of the interests conveyed by the appellees who had acquired the interests of other owners in the property; that Hewitt in pursuance of his refusal to convey to the Pattersons any interest in the property, and evidently denying all interest in the property by them, conveyed the one-eighth interest of each of the Pattersons to the company, the entire property having been located in the name of Hewitt; that the agent, Burgess, left the Territory of New Mexico prior to the trial of this cause, and his place of residence being unknown, his attendance could not be procured as a witness, and his testimony could not be obtained at the trial of this cause.

Upon these facts the court below dismissed the appellants' bill, and this decree of the court is assigned for error by the appellants.

Proceeding then to a consideration of the law of laches, as applied to stale claims by courts of equity, it will be found that each case must be determined upon its own circumstances; that the courts have frequently held that no iron clad rule can be laid down applicable to all cases, but that the circumstances of each case must determine the application of the law of laches as the equities are shown by the evidence. The reported cases show that while the lapse of time is one of the elements to be considered in applying laches to stale claims, it is only one, and that it is not ordinarily the controlling or most important one to be considered by the court in applying laches as a defense in equity.

In the case of Knight *vs.* Taylor, 1 Howard, 168, the court said: "We do not found our judgment upon the presumption of payment. For it is not merely on the presumption of payment, or the analogy to the statute of limitations that a court of chancery refuses to lend its aid to stale demands. There must be conscience, good faith, and reasonable diligence to call into action the powers
85 of the court. In matters of account, where they are not barred by the act of limitations, courts of equity refuse to interfere, after considerable lapse of time, from considerations of public policy, and from the difficulty of doing entire justice where the original transactions have become obscured by time, and the evidence may be lost."

In Brown *vs.* County of Buenavista, 95 U. S., 161, the court said:

"Laches and neglect are always discountenanced, and, therefore, from the beginning of this jurisdiction, there was always a limitation of suits in this court * * *. Limitation of the actions was dictated by experience, and is founded in a salutary policy, as the lapse of time carries with it the memory and life of witnesses, the muniments of evidence and other means of proof."

In Badger *vs.* Badger, 2 Wallace, 87, the court says:

"But there is a defense peculiar to courts of equity founded on lapse of time and the staleness of the claim where no statute of limitation governs the case. In such cases courts of equity act upon their own inherent doctrine of discouraging for the peace of society antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights.

In Twin-Lick Oil Company *vs.* Marbury, 91 U. S., 587, the court says:

"The doctrine is well settled, that the option to avoid such a sale must be exercised within a reasonable time. This has never been held to be any determined number of days or years, as applied to every case, like the statute of limitations, but it must be decided in each case upon all the elements of it which affect that question. These are generally the presence, or absence of the parties at the place of the transaction, their knowledge or ignorance of the sale, and of the facts which render it voidable, the permanent or fluctuating character of the subject matter of the transaction as affecting its value and the actual rise or fall of the property in value
86 during the period within which this option might have been exercised. In fixing this period in any particular case, we are but little aided by the analogies of the statutes of limitation; while, though not falling exactly within the rule as to time for rescinding or offering to rescind a contract by one of the parties to it for actual fraud, the analogies are so strong as to give to this latter great force, in the consideration of the case. In this class of cases the party is bound to act with reasonable diligence, as soon as the fraud is discovered, or his right to rescind is gone. No delay for the purpose of enabling the defrauded party to speculate upon the chancee which the future might give him of deciding profitably to himself whether he will abide by his bargain or rescind it, is allowed in a court of equity. * * * The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands today is worth nothing tomorrow; and that which would today sell for a thousand dollars, as its fair value, may, by the natural changes of a week, or the energy and courage of desperate enterprise, in the same time be made to yeild that much every day. The injustice, therefore, is obvious of permitting one holding the right to ascert an ownership in such property or voluntarily await events, and then decide, when the danger which is over has been at the risk of another to come in and share the profit."

In the case of Haywood *vs.* National Bank, 96 U. S., 611, the court says:—

"But the appellant is equally concluded by the lapse of time during which the transaction has been allowed to stand, without any effort upon his part to impeach it. It must now be regarded as unimpeachable. Courts of equity often treat lapse of time, less than that prescribed by the statute of limitations, as a presumptive bar, on the ground 'of discouraging stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right.' 2 Story Eq. Jr. 1520."

87 In Smith *vs.* Clay, (A. M. B.) 645, Lord Camden said:

"A court of equity which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, when the party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence. When these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced."

In Harwood *vs.* Railroad Company, 17 Wallace, 79, the court said:—

"That without reference to any statute of limitations, equity has adopted the principle that the delay which will defeat a recovery, must depend upon the particular circumstances of each case." "The question of acquiescence or delay may often be controlled by the nature of the property which is the subject of litigation. 'A delay which might have been of no consequence in an ordinary case, may be amply sufficient to bar relief when the property is of a speculative character, or is subject to contingencies, or where rights and liabilities of others have been in the meantime varied. If the property is of a speculative or precarious nature, it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage." Haywood *vs.* Eliot National Bank 6 Otto, 611.

In the case of Sullivan *vs.* Portland etc. Railroad Company, 94 U. S. 806, the Supreme Court of the United States quotes approvingly the exact language of the court in the case of Smith *vs.* Clay, *supra*, and in addition the court said:—

"To let in the defense that the claim is stale, and that the bill cannot, therefore, be supported, it is not necessary that a foundation shall be laid by any averment in the answer of the defendants, if the case, as it appears at the hearing is liable to the objection
88 by reason of the laches of the complainants, the court will, upon that ground, be passive and refuse relief. Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by the statute is required; and in some cases a shorter time is sufficient; and sometimes the rule is applied

where there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence and to decide accordingly.

In Galliher *vs.* Cadwell, 145 U. S. 368, the court said:

"The laches of the appellant is such as to defeat any rights which she might have had, even if these prior questions were determined in her favor; and in this respect it is worthy of notice that there has been in a few years a rapid and vast change in the value of the property in question. * * * Of course such a rapid increase during this decade implies an equal and enormous increase of the property so situated as to be an addition to the city, and the question of laches turns not simply upon a number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value and other circumstances occurring during that lapse of years. The cases are many in which this defense has been invoked and considered. It is true, that by reason of their differences of fact, no one case becomes an exact precedent for another; yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights and an ample opportunity to establish them in a proper forum; that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

The court then after referring to numerous cases supporting the doctrine just announced says:

89 "But *is it* unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time, but principally a question of the inequity of permitting the claim to be enforced—*and* inequity founded upon some change in the condition or relations of the property or the parties."

In the case of Penn. Mutual Life Insurance Company, *vs.* Austin, 168 U. S., 685, the court reviews a very large number of cases supporting the doctrine announced in the cases above cited, and in addition to those above cited, the court summing up the doctrine laid down by the authorities reviewed, says:

"The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words, where the court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect."

In the case of Townsend *vs.* Vanderworker, 160 U. S., 171, the court says:

"The question of laches does not depend as does the statute of limitation, upon the fact that a certain definite time has elapsed since the cause of action accrued, but whether, under all the circumstances of the particular case, plaintiff is chargeable with a want of due diligence in failing to institute the proceeding before he did." Speidel *vs.* Henrici, 120 U. S. 377, 387; Galliher *vs.* Cadwell, 145 U. S., 368, 371; Hammond *vs.* Hopkins, 143, U. S., 224, 250; Willard *vs.* Woods, 164 U. S., 502, 524; Sullivan *vs.* Portland, & Kennebec Railroad, 94 U. S., 806, 811; Lansdale *vs.* Smith, 106 U. S., 391, 394; Badger *vs.* Badger, 2 Wallace 87, 95; Line & Bodley Company, *vs.* Locke, 159 U. S., 193; Mackall *vs.* Cassilear, 137 U. S., 556; Whitney *vs.* Fox, 166 U. S., 637, 647, 648; Gildersleeve *vs.* New
90 Mexico Mining Company. 161 U. S., 573, 582; Abraham *vs.* Galveston City Company, 146 U. S., 102, 116; Foster *vs.* Mansfield, Cold Water etc. Railroad, 146 U. S., 88, 102; Hoyt *vs.* Lathan, 143, U. S. 553; Hauner *vs.* Moulton, 138 U. S., 486, 495; Richards *vs.* Mackall, 124 U. S., 183, 189; Roberts *vs.* Northern Pacific Railroad, 158 U. S., 1, 11.

The authorities above cited, it will be observed, are all causes determined by the Supreme Court of the United States. We will now refer to some of the decisions of the State courts in relation to the same doctrine. At the outset it may be admitted that the courts of the different States are not harmonious upon this question. In some of the States this doctrine is sustained and applied to the full extent laid down by the Supreme Court of the United States. In other States the courts while applying the doctrine above referred to, hold that the period of laches is governed by the statute of limitations specifically applicable to equity actions and defenses. The following and numerous other cases to which reference might be made, sustain the doctrine laid down by the Supreme Court of the United States, and the weight of authority supports the doctrine laid down by the courts of the United States. Calhoun *vs.* Delhi & Middleton Railroad Company, 24 N. E. Rep. 27; Mason *vs.* Sandford, 137 N. Y. 497; Boyer *vs.* East, 161 N. Y. Court of Appeals, 580; Pollard *vs.* Clayton, 13 Morrison's Min. Reps. 334; Hagerman *vs.* Bates, 38 Pacific, 1100; Great West Min. Co. *vs.* Woodmas of Alston Min. Co., 23 Pac., 908; Earnst *vs.* Vivian, 33 Law J. Ch. 517; Kinney *vs.* Webb, 49 Fed., 512; Graff *et al.*, *vs.* Portland & Co., 54 Pac., 854; Dobbins *vs.* Wilson, 107 Ill., 17; Whipple *vs.* Whipple, 109, Ill., 418; Hoyt *vs.* Pawtucket Institute, 110, Ill. 390; Stiger *vs.* Bent, 111, Ill. 328; Greenlees *vs.* Greenless, 62 Ala., 330; James *vs.* James 55 Ala., 525; Abernathy *vs.* Moses 73 Ala. 381; Brown *vs.* Covilland 6 Cal. 566; Harris *vs.* Hillegras, 66 Cal. 79; Chapman *vs.* Bank of California, 97 Cal., 155; Missouri Land & Water Co. *vs.* Flash, 97 Cal. 610; 73 Cal. 289; Sheldon *vs.* Nockwell, 9 Wis. 166; Scruggs *vs.* Decatur etc. 5 South Rep. 44; Moore *vs.* McIntyre,
91 110 Mich. 237; Davis *vs.* Fox, 59 Mo. 127; Landrum *vs.* Union Bank, 63 Mo., 56; Blis *vs.* Pritchard, 67 Mo. 181.

We have quoted from numerous cases decided by the Supreme Court of the United States, and various States, and have quoted rather liberally from some of them in order that it may be seen that the circumstances of each particular case must determine whether or not it is proper to apply the doctrine of laches, and it will be observed that in every case the circumstances were different and presented in various forms the inequity of granting relief, and, therefore, upon that ground the doctrine of laches was sustained as a defense, thus withholding from the complainant the relief prayed for by him when he was properly chargeable with the resultant delay. In many of the cases cited, the change in the value of the property involved either by enhancement or depreciation, has been considered of the utmost importance in sustaining or overruling this defense. In the case now under consideration, the fact is that the condition of the property in controversy had changed very greatly between the time the alleged rights of the appellants attached and the commencement of this suit. At the time the appellants alleged that their rights attached, the property involved was of little fixed and certain value; its value was largely speculative and was evidently so regarded, as the evidence shows that the interest claimed by the appellants in the property was offered for sale for a very small consideration before the appellants left the Territory, and that other interests in the same property were also disposed of from time to time prior to the year 1890 for small consideration. In the year 1890, however, large bodies of valuable minerals were discovered through the efforts of the appellees Hewitt, Watson, Fergusson and others, as a result of the expenditure of a large amount of money and the performance of a large amount of labor in the development of the property, and as a result of such discovery the property rapidly enhanced in value and several hundred thousand dollars of valuable minerals were taken therefrom prior to the commencement of this action, and the enhancement in value of this property was due alone to the diligent efforts of the appellees
92 and those co-operating with them in the development of the property, and without any assistance or the contribution of either money or labor by either of the appellants, or any one for them, for the purpose of developing the property. The condition of the property, therefore, was very greatly changed prior to any attempt of the appellants to invoke the remedy prayed for in this case.

Indeed appellant's counsel in their admirable brief admit the marked change in the condition of the property in this case. At page 33 of appellant's brief we find the following statement:—

"It would be idle to deny that the record discloses a change in the condition of the property. The testimony shows that for years the property was of great probable, but not certain, value, and that after 1890 it became of great certain value, and that this change was brought about by the perseverance of defendants (appellees in this case) in developing the property."

Thus, the fact that the property became from one of uncertain value, to one of great certain value prior to the attempt of the appelants to enforce any rights claimed by them, is an admitted fact, and this fact affords a very strong reason, taken in connection with the long period of delay in this case, why it would be inequitable to permit appeliants to obtain the relief prayed for. To permit them to recover in this case, would be to allow them to profit from the diligent efforts of others without any efforts or good faith shown upon their part. The character of the property involved has much to do with the application of this defense, also, as is pointed out in numerous cases above referred to. In this case the property involved was mining property, which is known to be of uncertain and fluctuating value. The difference of a few days, weeks, months or years may work a vast change in the value of mining property, and hence, as to this character of property greater diligence and more prompt action is necessary to the preservation of the rights of those claiming interests therein, which are of a possessory nature, and which can be preserved alone by diligence in complying with the provisions of the mining laws of the United States.

93 In the case of Twin-Lick Oil Company *vs.* Marbury, above referred to, the Supreme Court of the United States refers to Bliss *vs.* Edmunson, 8 De G. G. M. & G., 787, and Prendergast *vs.* Turton, 1 You. & Coll.

"The fluctuating character and value of this class of property is remarkably illustrated in the history of the production of mineral oil from wells. Property worth thousands to-day is worth nothing tomorrow; and that which would to-day sell for a thousand dollars as its fair value, may, by the natural changes of a week, or the energy and courage of desperate enterprise in the same time be made to yield that much every day. The injustice, therefore, is obvious of permitting one holding the right to assert an ownership in such property to voluntarily await the event and then decide when the danger which is over, has been at the risk of another, to come in and share the profit. While a much longer time might be allowed to assert this right in regard to real estate whose value is fixed, on which no outlay is made for improvement, and be little changed in value, the class of property here considered, subject to the most rapid, frequent and violent fluctuations in value of anything known as property, requires prompt action in all who hold an option, whether they will share its risks or stand clear of them."

In Haywood *vs.* National Bank, *supra*, we find the following reference to this:—

"If the property is of a speculative or precarious nature, it is the duty of a man complaining of fraud to put forward his complaint at the earliest possible time. He cannot be allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or repudiate it if that should prove to his advantage."

The appellants in this case had full knowledge of any rights which they had in the property in controversy in April, 1885,

whether their rights were acquired by doing the work required of them or by demand for conveyance by Hewitt. Both of these events transpired as early as that date. If their rights had accrued
94 to them in April, 1885, no effort was made by them to enforce their rights prior to the commencement of this suit in 1893. Therefore, at least eight years elapsed before the appellants took any steps whatever to enforce rights claimed by them in this property, after the appellants had full knowledge of the rights they now seek to enforce in this action. When it is considered that the property involved is mining property, subject to violent fluctuations in value, and the fact that in this case the value of the property was largely enhanced in value by the efforts of the appellees, can it be said that the appellants in this case exercised due diligence, or reasonable diligence in the enforcement of the rights claimed by them in this property? We think not. And as laches, means a want of proper and reasonable diligence, the appellants in this case are chargeable with laches, and they cannot escape the consequences for which they alone are responsible. Johnson *vs.* Standard Mining Company, 148 U. S., 360. Nor do the appellants in this case by their bill, nor does the testimony in the case, show any reasonable cause, or in any satisfactory manner account, for the long delay in bringing this suit. No excuse whatever is offered on behalf of C. Ewing Patterson. Henry J. Patterson by way of excuse as we find testified that when he first demanded a deed in 1884, Hewitt put him off, and promised to make a deed later. This will not suffice as an excuse on the part of Patterson, because the court found that Henry J. Patterson again demanded a deed in April, 1885, and Hewitt refused to execute the same, so that if demand and refusal of deed was necessary to fix his rights they were absolutely fixed in April, 1885.

In the case of Hume *vs.* Beal, 17 Wallace, 350, the court said:

"She says in general terms that she called on Beal repeatedly to settle, and that he promised to do so, and that these promises induced her not to sue him. This is the extent of her testimony on this subject, and her statement is so general, and so obviously necessary to avoid the bar of the statute of limitations and lapse of time, which were pleaded, that it carries little weight with it."

95 Henry J. Patterson testifies by way of excuse, that he was poor and had not the means to contribute further to the expense incurred in the development of the property. But poverty will not excuse a failure to use proper diligence in the assertion of legal rights where the party has, or ought to have full knowledge of his alleged rights, as in this case.

Again, a change in the relation of the parties and the death or absence of witnesses are considered by the courts of equity in applying laches to stale claims. It is true that in this case death did not intervene to prevent the production of material testimony, but it is a fact that the witness, Burgess, who remained in the vicinity of the property and who knew the appellees were developing the property, and who acted as the agent of one or both of the appellants,

and whom the testimony shows to have been in correspondence with one or both of the appellants, left the Territory in 1891, and his whereabouts being unknown, his testimony could not be obtained in this case, and yet it is apparent that his testimony would have been of great materiality and value. If his place of residence was known to the appellants, it was not divulged, and, therefore, his testimony was not available even by deposition, and the power of attorney, which constituted his authority to act, as testified by Henry J. Patterson, was also absent and could not be produced in evidence. The long delay in the commencement of this suit undoubtedly produced this result, for had the suit been commenced at any time up, to and including the year 1890, the testimony of Burgess could have been produced, as he was within the jurisdiction of the court. Neither can it be said that there was no change in the relation of the parties to the property prior to the commencement of this suit, because the Old Abe corporation was organized in 1892, and the whole, or almost the entire property, was conveyed to it by Hewitt, the locator of the property, and those to whom he had conveyed, and the company had issued stock in lieu of the individual interests in the property. It is true that the Old Abe Mining Company was organized by Hewitt, Fergusson, Watson and others, and the stock was
96 *was* divided between them, and doubtless remained so up to the time of the trial, but at least the appellee Mathew Hoyle came into the possession of his rights by a conveyance from Watson, dated June 9, 1890, and Hoyle conveyed five forty-eighths (5/48) of the property to the Old Abe Company, retaining one-forty-eighth (1/48). He, therefore, acquired whatever interest he had in 1890 prior to the enhancement of the value of the property and conveyed to the company a portion of his holdings after the property had largely increased in value. So that while the change of the relation of the parties to the title was not radical, there was a change which, owing to the enhancement of the value of the property, became an important one, when the prayer of the bill, as to the relief sought, is considered. The prayer of the bill being substantially, that Hewitt and the Old Abe Company be required by the court to convey to appellants free and clear of all encumbrances or liens an undivided one fourth part of said two claims, the court making such provision in its decree as may be necessary to and proper for the protection of said stock holders in said company given said Hewitt, and all the property held by said Hewitt, both real and personal, be declared by the court to be subject to a lien on behalf of appellants for the payment of their full one-fourth of the value of all such ore, or ores, taken from said claims; that defendants, appellees Fergusson, Watson, Hoyle and the Old Abe Company be required to render an account for what has been received by each of them from the proceeds of such ores, in case Hewitt shall not be possessed of sufficient property to fully pay what may be found due appellants, and the other defendants shall be required to pay the deficiency, and appellants be declared to have a lien upon the whole of said two claims for the

payment of such deficiency. And there is also a prayer for a restraining order and the appointment of a receiver.

The failure of the appellants to take any steps whatever for the enforcement of their alleged rights, for at least eight years, after they had full knowledge of such rights, and also knowledge that their rights had been repudiated and refused by Hewitt whom they
97 claimed to be trustee of their rights, and the silence of both themselves and their agent, and their failure to in any way contribute to the development of the property and the enhancement of its value, was sufficient to raise a presumption of the abandonment of any rights claimed by them in the property, and their silence and acquiescence in the refusal of the trustee to convey, and the testimony in this case fully supports the finding of the court on that point, confirms the belief that when the appellants removed from the Territory they intended to pay no further attention to this property, and never intended to contribute to its development, or the performance of assessment work required by the Government to sustain the possessory title which alone existed at that time, nor contributed to the expense of obtaining a patent, and, therefore, as found by the court they apparently took no interest whatever in the property during their absence, and the conclusion is necessarily reached, that the knowledge of the great enhancement of value of this property which occurred in the year 1890, and thereafter, was the circumstance which caused them to attempt to assert the rights formerly claimed by them in this property. Such being the case, they fall within the doctrine laid down in Twin-Lick Oil Company *vs.* Marbury, *supra*, that: "No delay for the purpose of enabling the defrauded party to speculate upon the chances which the future may give him of deciding profitably to himself whether he will abide by his bargain, or rescind it, is allowed by a court of equity."

Or, as was said in the case of Kinne *vs.* Webb, 49 Federal Reporter, 512:

"The rule has a pointed and salutary application to controversies like this. Regarding mineral lands, such property is exposed to the utmost fluctuations in value. Its wealth lies beneath the surface. It is hidden from the view. Money, energy, labor and skill are required to develop it. To-day the indications are full of promise. To-morrow they are as full of discouragement. The mine which today may be deserted and out of consideration, or which, being worked, produces small results, may in a few years, by persistent energy and the expenditure of money, turn out
98 to be vastly productive and valuable. The courts all say, respecting suits to vacate contracts affecting such property, and attempts to reclaim it, the party will be held to the highest diligence and acceleration in his movements. He cannot stand by and speculate on the chances. He cannot delay and say by his acts, it is mine if it be a good thing. You may keep it if it be a poor thing. So when parties have waited four or five years, and even a shorter period, after knowledge of the fraud, during which time the prop-

erty has been improved and its value greatly augmented, the delay constitutes a fatal estoppel."

These considerations in the opinion of this court fully demonstrate that it would be highly inequitable to grant the relief prayed for by the appellants in this case, the circumstances being such as to justify, in fact, demand the application of the law of laches as applied to stale and inequitable claims. The decree of the court below dismissing the bill was a proper decree, and should not be set aside, unless the ten years' statute of limitations is applicable here, and lapse of time alone, governs the application of laches by courts of equity in this Territory.

Proceeding then to the consideration of the matter of the limitations, it will be observed that in the cases above cited, and in the case of Galliher *vs.* Cadwell, 145 U. S., 368, it has been repeatedly said as to the application of laches in courts of equity:

"They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting a claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties."

It will, therefore, be seen that unless the legislation of this Territory necessitates a different application of the doctrine of laches, the doctrine above laid down must control, and, therefore, time, while one of the elements to be considered in the application of equitable laches, many other considerations are of equally, if not of more value in determining whether or not this defense should
99 be sustained. In the case last above referred to the Supreme Court refers to a number of cases in which the doctrine of laches applied regardless of the statute of limitations, and where the period of time which elapsed was comparatively short. The court points out that in the case of Harwood *vs.* Railroad Company, *supra*, and Davidson *vs.* Davis, 125 U. S., 90, a delay of five years was held to be inexcusable laches. In Twin-Lick Oil Company *vs.* Marbury, *supra*, and Hayward *vs.* National Bank, *supra*, four years was held to be laches. In Brown *vs.* County of Buenavista, *supra*, seven years was held to be laches, although the information of the complainants was received but twenty months before the commencement of the suit. In Holgate *vs.* Eaton, 160 U. S., 33, and in Societe Fonciere *vs.* Milliken, *supra*, a delay of two years in each case was held inexcusable laches. In the case of Pollard *vs.* Clayton, 13 Morrison's M. Reports, 334, a suit relating to mining property, eleven months was held to be fatal delay, and in the case of Hagerman *vs.* Bates, 38 Pacific Reporter, 1100, two years was held to be a bar to recovery, and further that the defense of laches is in no sense dependent upon the statute of limitations. In the case of The Great West Mining Company *vs.* Woodmas, of Alston Mining Company, 23 Pacific Reporter, 908, the court said:

"In the case of Atwood *vs.* Small, 6 Clark & F. 356, the lord chancellor was of the opinion that relief should be refused in refer-

ence to mining property, for the reason that a delay of six months had intervened between the time at which the complainants acquired knowledge of the alleged frauds, and the bringing of the motion."

And in the case of Earnest *vs.* Vivian, 33 Law J. Ch. 517, it is said:

"The statute fixes a limitation beyond which the courts cannot extend the time but within this limit, the peculiar doctrine of courts of equity should prevail."

In the case of Kinney *vs.* Webb, *supra*, four or five years was declared laches after knowledge that the property was being improved and augmented in value.

100 "In a recent case of Graff *et al.*, *vs.* Portland & Company, 54 Pacific Reporter, 854, laches was applied because of the delay of less than two years, and the statute of limitations was expressly held to be inapplicable."

In the case of Alsop *vs.* Riker, 15 U. S. Supreme Court Reporter, 162, the court says:—

"The case is one peculiarly for the application of the rule that equity, in the exercise of its inherent power to do justice between the parties, will, when justice demands it, refuse relief, even if the time elapsed without suit is less than that prescribed by the statute of limitations."

That portion of section 2938 of the Compiled Laws of 1897 which the appellants rely upon is substantially as follows:—

"No person shall maintain any suit in law or equity for any lands but within ten years next after his right to maintain such suit shall have accrued, and all suits in law or equity for the recovery of any lands shall be sued within ten years next after the title or cause of action accrued, and at no other time after ten years shall have expired."

We are unable to see anything in this section of the statute, beyond a simple provision that after ten years have elapsed from the time the title or cause of action accrued, no suit can be brought for the recovery of lands in a court of law or equity. This is simply a ten years' statute of limitations for the recovery of lands alone, and made applicable to courts of equity as well as law in this Territory, but it does not extend to all actions for the enforcement of equitable rights, and, therefore, it is limited in its effect. Even if this statute was applicable in this case, it does not prevent the application of the equitable doctrine of laches within the ten years where the relief sought is shown to be wholly inequitable. The statute is not intended to have any application to actions commenced within ten years from the time the right of action accrued, but simply provides that after ten years have elapsed, there shall be no remedy for the recovery of lands, either in a court of law or equity. In the

101 State of New York there is a statute of limitations made specifically applicable to actions in equity, and it is even more comprehensive than our statute, and yet, the courts of New

York since the passage of that statute, have in several cases applied the doctrine of laches as laid down by courts of equity where the time elapsed, was less than the period of ten years provided for in the statute of that State. In the case of Calhoun *vs.* Delhi & Middleton Railroad Company, the supreme court of the State of New York said:—

"In the present case the cause of action for the cancellation of the bonds was not barred by the ten years' statute applicable to equitable actions. But a period of nine years had elapsed after the bonds were issued before the commencement of the action. But we apprehend that the period of limitation of equitable actions fixed by the statute is not, where a purely equitable remedy is invoked, equivalent to a legislative direction, that no period short of that time shall be a bar to the relief in any case, or precludes the court from denying relief in accordance with equitable principles for unreasonable delay, although the full period of ten years has not elapsed since the cause of action accrued."

In Mason *vs.* Sandford, 137, N. Y. 497, the court decided that in an action at law, no mere lapse of time will absolutely defeat an application for a revival of the action, and a continuance thereof in the name of the representative of a deceased party, but the motion to revive, however, may be denied, for laches in making it. In an equitable action there is a time limitation of ten years, but the court may deny the motion, on account of prejudicial laches within that period.

In the case of Boyer *vs.* East, 161 N. Y., court of appeals, 580, a recent case, decided in February, 1900, the court applies the same doctrine as the case above cited. In this case real estate was sold, the heirs being 15 and 17 years old, at the time the sale took place. After coming of age, and their right of action had fully accrued, they failed for a period of eight years to bring an action to set aside the sale. The court refused to entertain the action, and in
102 deciding the case said:—

"The defendants had the right to invoke the equitable doctrine that as the plaintiffs had slept so long on their rights, they should be deemed to have waived the right to attack the title, acquired through their mother's purchase and conveyance. Whether a court of equity should come to the aid of those who have failed in diligence will depend upon the circumstances of the case. These plaintiffs were beyond the age, when, at common law, guardianship in socage might cease. One was in his 15th year, and the other in his 17th year at the time of the sale. They were, more or less, conversant with what their mother had done; but upon attaining their majorities in 1886 and 1888, though she survived until 1890, there was no assertion of any claim by them until in 1896. If they had the election to treat as void the sale to and the conveyance by their mother, it was incumbent upon them to be reasonably diligent, and the delay in bringing such an action was, in my opinion, under the circumstances, fatal."

All of the judges of the court concurred in this opinion, except Chief Justice Parker, who concurred in that portion of it which we have just quoted. Old Colony Trust Company *vs.* Dubuque Traction Company, 89 Federal Reporter, 794; Hubbard *vs.* Mandant Trust Company, 87 Federal Reporter, 51.

In the case of Continental National Bank *vs.* Heilman, 86 Federal Reporter, 514, in construing the statute of limitations of Indiana, Judge Wood says:—

"The provisions of the Indiana statute that the suit of a creditor out of the State must be brought within two years after the final settlement of the estate, would, therefore, like any other statute of limitation which allows reasonable time from the bringing of suit, be recognized by all courts as valid; but like all other such statutes it will not be deemed to give a right to one within the time limited regardless of laches, or other considerations which would make the suit when brought, inequitable."

Graff *et al. vs.* Portland etc. & Company, *supra:* Alsop *vs.* Riker, *supra.*

103 It is scarcely necessary to pursue this branch of the case further, as the cases last referred to, are directly in point, and in each case a statute of limitations existed fully as broad and even more comprehensive, than the statute relied upon by the appellants here, and yet the courts applied the doctrine of equitable laches, independent of the statute of limitations, notwithstanding the statutes were made specifically applicable to equitable actions. Many cases may be found in which courts of equity will be governed by the statutes of limitations, and entertain an action, and give relief for the full period provided by the statute. Indeed this would doubtless be done in all cases where the facts of the case, do not show, that the relief sought was inequitable. A case might be entertained, even after the limitation had expired, but in many cases, the courts of the States, as well as those of the United States have laid down, and asserted the right to do equity wherever the circumstances demanded it, and that the right to exercise the inherent power of courts of equity, could not be taken away by a limitation statute where time alone controls. The facts in this case to which we have above referred, it seems to us, show, that the relief sought in this case is inequitable, and, therefore, one of those cases in which the relief sought should be denied.

We, therefore, hold that the law of laches as applied by courts of equity to stale claims, was properly applied in this case, and that the statute of limitations is no bar to its application.

The appellants seek to reverse the judgment in this case upon the further ground, that under the facts they were entitled to recover because of a resulting trust, and that the remedy sought was the enforcement of a resulting trust. The court below found that Hewitt acted in the capacity of a trustee, but did not state what kind of a trust relation existed. There are several kinds of trusts,

and it is important in this case, to determine what kind of a trust existed between Hewitt and the appellants, and this question must be determined alone by the facts. The mining locations covering the ground in controversy here, were made by John Y. Hewitt
104 individually, and in his own name. The appellants in this case claim the interest for which they now seek to recover, under an agreement made between themselves, Hewitt and others at a meeting held in August or September, 1883. This agreement was a parol or unwritten contract or agreement. There is no pretense of a written contract or agreement in this case. Whatever rights, therefore, the appellants had in this property, and if John Y. Hewitt, became their trustee at all, it was by virtue of this parol contract or agreement between the parties. If they relied upon this agreement, as the testimony shows they did, it was an express trust, and not a resulting trust. If, therefore, an express trust existed between the parties in 1883, the trust originated in a parol or unwritten contract or agreement. There was no express provision that the agreement should be performed within a year. If, then, the contract or agreement involved real estate, as contended by the appellees, it would be void under the statute of frauds which is in force in New Mexico. If, however, the appellants seek to avoid the force of the statute of frauds, on the ground, that the parol contract entered into was performed within a year, and was, therefore, an executed contract, section 2916 and 2930 of the Compiled Laws of 1897 would seem to be applicable to this case. Section 2916 is one of the sections of the statute of limitations of this Territory and reads as follows:—

"Those founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified, within four years."

This section established a limitation of four years in all actions founded upon the provisions of the section. One of the provisions of this section is: "All actions founded upon unwritten contracts." There does not seem to be any qualification to this provision, but its terms seem to be broad enough to include all unwritten contracts. It cannot well be said that this section is alone applicable to actions at law, so as to exclude agreements establishing
105 trust relations cognizable in courts of equity, and it would seem that the section was intended to be broad enough to include equitable actions for the reason, that another provision applies the same limitations to actions for relief upon the ground of fraud, which is a recognized basis for the exercise of equitable jurisdiction.

Now admitting that the agreement or contract was for the establishment of trust relations between the parties, it would come within the provisions of section 2930, Compiled Laws, 1897, which reads as follows:—

"None of the provisions of this act shall run against causes of actions originating in or arising out of trusts, when the defendant has fraudulently concealed his cause of action, or the existence thereof from the party entitled or having the right thereto."

This section does not apply of course, to all trusts, but it is applicable directly, to trusts, other than those where the defendant has "fraudulently concealed the cause of action or the existence thereof, from the party entitled or having the right thereto." There is no attempt in this case to show, that there was any fraudulent concealment of the cause of action or the existence thereof from the appellants. On the contrary, it is abundantly shown, and the court so found, that the appellants not only claimed an interest in this property and demanded a conveyance of the same to them by Hewitt, as early as 1885, Henry J. Patterson testifying that he demanded a conveyance as early as 1884, but appellants were also aware that Hewitt openly refused to comply with that demand and perform any trust agreement which appellants claimed, as early as that date.

The first part of this section, therefore, seems to apply, because the cause of action in this case originated in or arose out of a trust, in the very language of the section, and would be subject to the statute of limitations of four years, provided for in section 2916, it has been repeatedly held, that where an action is brought to enforce a trust, if the trust has been repudiated by the trustee, and
106 the *cestui que trust* have knowledge of that fact, he or they will be held to prompt diligence in asserting rights which they might have at the time of the repudiation by the trustee. In this case the court finds that the appellants had knowledge of the repudiation by the trustee and the refusal to convey by Hewitt as early as April, 1885, and as they claimed to have performed their part of the agreement prior to that time, and made demand for deed, their cause of action was fully accrued at that time; it accrued either upon the performance by them of their part of the contract, or by demand for deed. Therefore, the statute of limitations would begin to run from that date, and after four years had elapsed, from that date, the appellants would be without a remedy, and the relief sought in this case would be barred.

In the case of Godden *vs.* Kimmel, 99 U. S. 201, the court said:—

"Courts of equity acting on their own inherent doctrine of discouraging for the peace of society antiquated demands refuse to interfere in attempts to establish a stale trust, except where the trust is clearly established, or where the facts have been fraudulently and successfully concealed by the trustee from the knowledge of the *cestui que trust*. Relief in such case may be sought; but the rule is that the *cestui que trust* should set forth in the bill specifically what were the impediments to an early prosecution of the claim, and how he or she came to be so long ignorant of their alleged rights, and the means used by the respondent to keep him or her in ignorance, and how he or she first came to the knowledge of their rights."

And in Marsh *vs.* Whitmore, 21 Wallace, 185, the court said:—

"The party appeals to the conscience of a chancellor in support of the claim where there has been laches in prosecuting it, or long acquiescence in the assertion of an adverse right, 'he should set forth in his bill specifically what were the impediments to an early prosecution of his claim;' and if he does not, the chancellor 'may refuse to consider his case on his own showing, without inquiring whether there is a demurrer or any formal plea of the statute of lim-
107 itations contained in the answer.'"

And so it is held in numerous other cases, that where the trustee has repudiated the trust claimed, the party seeking to enforce rights under it must act with diligence, and if delay has occurred, it must be shown what were the causes for the delay or the impediments to an early assertion of the rights of the *cestui que trust*. In this case, appellants have failed in both respects. There has been both unreasonable delay and absolutely no reason shown why the appellants did not attempt to enforce the rights claimed by them within a reasonable time after they had fully accrued in 1885, and they alone must suffer the consequences of their own voluntary negligence. Wagner *vs.* Baird, 7 Howard, 234; Lansdale *vs.* Smith, 106 U. S., 391; Naddo *vs.* Sanders, 93 U. S., 55; Badger *vs.* Badger, *supra;* Mining Company *vs.* Watrous, 61 Federal Reporter, 817.

As to the application of the statute of limitations and also the doctrine of laches in the case of trusts where the *cestui que trust* has knowledge of the repudiation of the trust, the Supreme Court of the United States in the case of Speidel *vs.* Henrici, 120 U.S., 377, said:—

"As a general rule, doubtless, length of time is no bar to a trust clearly established, and express trusts are not within the statute of limitations because the possession of the trustee is presumed to be the possession of the *cestui que trust*." Prevots *vs.* Gratz, 6 Wheaton, 481; Lewis *vs.* Hawkins, 23 Wallace, 119; Railroad Company *vs.* Durant, 96 U. S., 576.

But this rule is, in accordance with the reason on which it is founded, and, as has been clearly pointed out by Chancellor Kent and Mr. Justice Story, subject to this qualification, that time begins to run against a trust as soon as it is openly disavowed by the trustee, insisting upon an adverse right and interest, which is clearly and unequivocally made known to the *cestui que trust;* as when, for instance, such transactions take place between the trustee and the *cestui que trust*, as in case of tenants in common, amount to an
108 ouster of one of them by the other (citations); this qualification has been often recognized in the opinions of this court, and distinctly affirmed by its latest judgment upon the subject. Willison *vs.* Watkins, 3 Peters, 43; Boone *vs.* Chiles, 10 Peters, 177; Seymore *vs.* Freer, 8 Wallace, 202; Bacon *vs.* Rives, 106 U. S., 99; Philippi *vs.* Philippi, 115 U. S., 151.

We are of the opinion, therefore, that the trust relation claimed in this case by the appellants and the rights which they allege under it, are not available as against the defense of laches. This

suit was brought and final decree rendered prior to the adoption of the code in this Territory, and consequently the provisions of the code are not applicable here. The cause is of purely equitable jurisdiction. The suit was commenced by bill in equity, and the entire proceedings were conducted according to the law applicable to courts of equity, and as such, it should be determined upon purely equitable principles. Being of the opinion that the decree of the court below was a proper one under the facts and the law of this case, it will be affirmed with costs; and it is so ordered.

JOHN R. McFIE,
Associate Justice.

We concur:
WILLIAM J. MILLS, *C. J.*
FRANK W. PARKER, *A. J.*
J. W. CRUMPACKER, *A. J.*

109 TERRITORY OF NEW MEXICO, *Supreme Court of N. M.*, } *ss:*

I, the undersigned, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing one hundred and eight pages contain a full true and perfect copy of the record and proceedings, pleadings and opinion of the court filed in the case of C. Ewing Patterson, *et als.* appellants, *vs.* John Y. Hewitt, *et als.*, appellees which is hereby transmitted to the Supreme Court of the United States, in accordance with an order allowing an appeal in the above entitled matter.

Witness my hand and the seal of the supreme court of the Territory of New Mexico, this the 14th day of February, A. D., 1903.

[Seal Supreme Court, Territory of New Mexico.]

JOSÉ D. SENA,
Clerk Supreme Court of N. M.

110 The United States of America to John Y. Hewitt, William Watson, and Mathew Hoyle, residents of the county of Lincoln; H. B. Fergusson, resident of the county of Bernalillo, and the Old Abe Company, a corporation organized under the laws of the Territory of New Mexico and having its principal place of business at White Oaks, in said county of Lincoln, New Mexico, Greeting:

You, and each of you are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, on the first Monday in October, A. D., 1903 and that you enter your appearance therein within sixty days from the date of this citation, pursuant to an appeal granted from the supreme court of the Territory of New Mexico, wherein, C. Ewing

Patterson, *et als.*, were appellants, and John Y. Hewitt, *et als.*, were appellees and there to show cause, if any there be, why the judgment rendered against the said appellants as — the said order of appeal mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller Chief Justice of the Supreme Court of the United States, this the 14th day of February, A. D., 1903

[Seal Supreme Court, Territory of New Mexico.]

WILLIAM J. MILLS,
Chief Justice, Supreme Court of New Mexico, etc.

On this — day of —— in the year of our Lord one thousand nine hundred and three, personally appeared before me the subscriber, —— —— and makes oath that he delivered a true copy of the within citation to —— ——

—— ——.

111 I hereby acknowledge service of this citation on me this 21st day of March, 1903, as one of the appellees mentioned within, and as attorney for the other appellees.

H. B. FERGUSSON.

[Endorsed:] Original.

Endorsed on cover: File No. 18,886. New Mexico Territory supreme court. Term No. 254. C. Ewing Patterson *et al.*, appellants, *vs.* John Y. Hewitt *et al.* Filed April 7, 1903. File No. 18,886.

Supreme Court, U.S.
FILED
OCT 12 1904
JAMES H. MCKENNEY
Clerk

BRIEF FOR APPELLANTS.

Supreme Court of the United States

OCTOBER TERM, 1904.

NO. 23.

C. EWING PATTERSON ET. AL.,
APPELLANTS,
vs.
JOHN Y. HEWITT ET. AL.

APPEAL FROM SUPREME COURT OF NEW MEXICO.

W. B. CHILDERS,
F. W. CLANCY,
Counsel for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1904.

C. EWING PATTERSON ET. AL.,
vs.
JOHN Y. HEWITT ET. AL.
} No. 24

APPEAL FROM SUPREME COURT OF NEW MEXICO.

STATEMENT OF CASE.

This case was begun on the 29th of April, 1893, in the district court for Lincoln county, by the filing of a bill of complaint on behalf of C. Ewing Patterson, a resident of New Jersey, and Henry J. Patterson, a resident of New Mexico, against John Y. Hewitt,

William Watson, Mathew Hoyle and Harvey B. Fergusson, residents of New Mexico, and Old Abe Company, a New Mexican corporation.

BILL OF COMPLAINT.

The case set up by the bill of complaint is substantially as follows:

Complainants, with Charles A. Buford, Edward Morrow and defendant Watson, made a mining location in the White Oaks mining district in October, 1881, of a claim known as Consolation lode, within which Henry J. Patterson had discovered mineral-bearing rock in place; and the said parties immediately after claimed and located a tunnel site called the Hidden Treaure for the purpose of developing the veins and lodes of the Consolation. Buford and Morrow shortly afterward abandoned the property and have never made any claim thereto since that time, Morrow having left the country and Buford having been accidentally killed two or three years before this suit was begun. Complainants continued work on the claim and tunnel site, and before the end of 1883 discovered another vein, which is the one upon which other locations called the White Oaks and Robert E. Lee were afterwards made; and upon which nearly all of the operations of the defendant company have been carried on. Prior to this a claim had been located by three persons named Allen, Livingston and Kelsey, which was called the Old Abe, and which conflicted with the Consolation claim. Complainants and Watson asserted that these locators had failed to do their work and had lost their

rights, but this was not admitted and was a matter of dispute. In the latter part of 1883 a meeting was held at White Oaks for the purpose of harmonizing the different interests, at which meeting there were present the complainants, the defendants Watson and Hewitt, one Chase as administrator of Allen, and four persons, named Redmond, Woodland, Hockradle and Hathaway, who claimed to own the interest of Livingston. At that meeting it was agreed that all previous locations should be abandoned, that a new location should be mde by Hewitt in his own name as trustee of all of said parties for his and their benefit upon the discovery which had been made by Patterson, and that he should receive an eighth interest for his services. It was further agreed that the property should be owned by the two Pattersons, Watson, the heirs of Allen, one Spiegelberg, Kelsey and Hewitt, an eighth each; Hockradle and Hathaway, one twenty- fourth each, and Redmond and Woodland, one twenty-fourth jointly. Shortly after the meeting Hewitt advised the other parties that Spiegelberg really had no interest, and it was agreed that his share should be sold to defendant Fergusson for $500 to be used in development work. It was further agreed that each of the parties should contribute his proportionate share towards performance of enough work to entitle the owners to a patent from the United States, and that Hewitt should apply for the patent and attend to all of the business connected therewith; and Hewitt agreed to make the locations and convey to the parties respectively their interests in

the property when they should have carried out their agreement as to the performance of work.

The parties in interest immediately went to work upon the property, the work being carried on under the superintendence of Henry J. Patterson and within less than a year work had been done in value not less than $1,500.

On the 2nd of May, 1884, Hewitt made the two locations called the Robert E. Lee and White Oaks, respectively, upon the vein discovered by complainant, Patterson.

In the winter of 1884 and 1885 Patterson applied to Hewitt several times for his deed, but was put off by Hewitt on various pretexts. Patterson then decided to leave that district temporarily with the hope of returning as soon as able to resume work on the property, and he arranged with Hewitt for the delivery of his deed to another person after he went away.

Accordingly he did leave in March, 1885, and from that time until the summer of 1892 was engaged in prospecting and mining nearly all of the time outside of New Mexico and in every State and Territory west of the Rocky Mountains and in Lower California, but without the accumulation of sufficient money to return to White Oaks as he had intended. Up to the fall of 1891 he knew nothing about the property in question, but at that time by means of a newspaper he learned that the property was being operated at a profit and he returned to New Mexico as soon as he possibly could, arriving in the Territory in June, 1892.

The other complainant, C. Ewing Patterson, removed from New Mexico to New Jersey about the end of the year 1883, leaving his business in the hands of his brother, and of his partner, the defendant Watson. has never returned to New Mexico and never knew anything about the development and operation of the property until informed by his brother in 1892.

It was alleged upon information and belief that Hewitt had admitted complainant's interest and had not denied their rights until after they had both left New Mexico, but that he had for several years given out that complainants had no right and he had refused and still did refuse to acknowledge their rights and to make them deeds.

Complainants further set out certain conveyances between the defendants by which apparently nearly all of the title was conveyed to the Old Abe Company; and that applications were made in September, 1889, by Hewitt, Watson and Fergusson for patents to the two claims.

The defendants had been carrying on mining operations on the claims and had extracted large quantities of mineral and converted the same to their own use. the aggregate value being alleged upon information and belief as not less than $600,000, and refused to account for the same or any portion thereof to complainants.

Complainants prayed that Hewitt should be decreed to have acquired title to the two claims in trust for the benefit of the complainants to the extent of one-fourth thereof; that the other defendant be declared

to have taken title to portions of the claims with notice of the rights of complainants; that complainants have a lien upon the property in the hands of the other defendants to the same extent as they might have had in the hands of Hewitt; that an account be taken of all ore extracted and that Hewitt should be required to pay over to the complainants one-fourth of the value of all ore taken from the claims without any allowance for costs or expenses; that Hewitt and the Old Abe Company should be required to convey to complainants fourth thereof; that the other defendants be declared an undivided one-fourth part of the claims, the court making such provision in its decree as might be necessary for the protection of stockholders in the company other than Hewitt; and, in case Hewitt should not be possessed of sufficient money fully to pay what might be found due to complainants, that the other defendants should be required to pay the deficiency and that complainants have a lien upon the two claims for the payment of such deficiency; and there was also a prayer for general relief.

ANSWER OF DEFENDANTS.

To this bill of complaint the defendants filed their answer on the 27th of June, 1893, and by that answer every material allegation of the bill of complaint was either denied, or not admitted and proof thereof called for. By the answer it was admitted that in the latter part of 1883 a meeting was held at White Oaks as alleged in the bill, but it was denied that it was for any such purpose as was set up in the bill although the an-

swer did not show for what purpose the meeting was held. It was admitted that Hewitt did make the two locations, but it was denied that he made them under any promise or agreement to act as trustee as alleged in the bill.

It was specifically denied that Henry J. Patterson ever applied to Hewitt at any time for any deed for his pretended interests. It was admitted that Henry J. Patterson did leave New Mexico and it was averred that he then and there abandoned the property and had failed to pay any part of the costs, labor and expenses of locting the lead or of developing the same or of performing annual assessments thereon, and that neither of complainants then had or had afterwards acquired any interest in law or in equity in the property. It was further alleged in the answer that whatever right the complainants might have had, had been forfeited because of their failure to contribute to the annual assessment work during the years 1884 and 1885 and that at the end of 1885 notice had been given as required by the United States statute in a newspaper calling upon complainants to contribute their share to such assessment work which they failed and refused to do.

The answer also set up the statute of frauds as a bar, and that complainants had been guilty of laches. It did not plead any statute of limitations.

FINDINGS BY THE COURT.

It will be seen that the case made by the bill was one of a trust under an agreement with Hewitt which

agreement had been fully performed by the other partie thereto; while the answer absolutely and utterly denied that any such agreement ever was made or that any such trust existed.

We are not permitted in this court to go into a consideration of the facts as shown by the proofs, but are limited to what appears from the findings of the courts below. The act of congress of 1874 relative to appeals from territories, cuts off any review of the testimony.

The findings of fact made by the district court, and afterwards adopted by the supreme court of the territory, will be found at pages 40 to 43 of the printed record. Reference is made to these pages although the findings appear twice elsewhere in the record, because at this place some minor errors in names and dates are corrected.

The findings of the court which are numbered from one to twelve, both inclusive, fully and entirely sustain the case of complainants, showing as they do the early occupation of the mining ground in dispute by the complainants and Watson, the dispute as to the title between them and other parties, the discovery of rich ore prior to August, 1883, by one of complainants, the holding of the meeting as alleged in the bill, the agreement that all old locations should be abandoned and the ground taken by a trustee, Hewitt being designated as such trustee, he to convey to each of the parties his proportionate interest if he contributed his part of the labor and expenses in doing the necessary work in order to obtain a patent, the two complainants, and

defendants, Hewitt and Watson each to receive a one-eighth interest; that the work was done as agreed between August, 1883, and April, 1885, and that complainants contributed their full share, and in April, 1885, were each entitled to a deed from Hewitt as trustee for their interests in the property.

The whole case of the complainants having thus been found in their favor by the court, it is evident that the adverse decision of the court below must rest upon other facts outside of those relied upon by complainants, and we turn to the remaining findings to ascertain what those facts can be.

The other findings of the court are, in substance, that Henry Patterson in person and by an agent in April, 1885, demanded a deed from Hewitt and that Hewitt declined and refused to make the deed; that Hewitt has never made such deed, but has always declined and refused to make the same and has disputed the right of complainant to his deed; that Ewing Patterson demanded his deed from Hewitt for the first time immediately prior to the institution of this suit, and that Hewitt refused to make such deed; that during the years 1885 to 1890, Hewitt, Watson and Fergusson did a large amount of work and expended a large amount of money on the property, and that complainants have never contributed or offered to contribute any part of such expenses; that in November, 1890, Watson, Fergusson and Hewitt discovered a large body of rich ore, and have taken out a large amount of gold amounting to several hundred thousand dollars;

that Ewing Patterson left New Mexico in the year 1892 (thi should be 1883,) and has never since returned; that Henry J. Patterson left White Oaks in the latter part of March, 1885, and from that time until the fall of 1892, was a non-resident of this Territory; that since he left this Territory, neither he nor C. Ewing Patterson in any way contributed to the development of the property, and took no steps prior to the bringing of this suit to enforce their rights or to require Hewitt to carry out his agreement, and took apparently no interest in the property and made no effort to enforce their rights until the institution of this suit; that Henry Patterson, through his agent Burgess, had knowledge that Hewitt refused to carry out the agreement; that he had such notice in April, 1885, and again in the summer of 1887, and that he and his co-complainant were fully advised "after April, 1885," that Hewitt refued to carry out the agreement.

As a conclusion from these findings of fact the court held that complainants were barred and that the bill should be dismissed.

There is one other finding of fact not included in the above statement, numbered 18, which shows that there had not been down to January, 1896, when defendants' testimony was taken, any substantial change in the parties interested in the property so that there would be any obstacle to giving plaintiffs the relief prayed for upon the ground that innocent purchasers for value and without notice had become interested in the property.

It is evident from the foregoing statement that the court denied the right of complainants to the relief sought, on the ground of their supposed laches in asserting their rights, but it is to be noted that nothing more than mere delay is imputed to them.

The complainants have made and filed in this court the following:

ASSIGNMENT OF ERRORS.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 254.

C. EWING PATTERSON, ET AL.,

vs.

JOHN Y. HEWITT, ET AL.

Now come the appellants, by their attorneys, and say that there is manifest error in the record, proceedings and decree in this cause in the courts below, and specify the following as assignments of errors therein:

1. The courts below erred in finding that neither of the complainants ever contributed or offered to contribute any part of the expense of the work done by Hewitt, Watson and Fergusson during the years 1885 to 1890, because that fact is immaterial, as complainants were under no obligation so to contribute.

2. The courts below erred in failing to find as to whether complainants were ever called upon by anyone

to contribute to the work done from 1885 to 1890.

3. The courts below erred in holding as a conclusion from the facts established, that the complainants were barred from any right of recovery, as the findings of fact do not support such conclusion.

4. The courts below erred in failing to hold, as matter of law, that the facts found, established the existence between complainants and defendants of a mining partnership for a limited and definite purpose, terminable only by the making by defendant Hewitt of the deeds to complainants to which the latter were entitled as the court found.

5. The courts below, having found as matter of fact that complainants fully performed all required of them by the agreement of 1883 so as to entitle them to deeds from defendant Hewitt, who refused to give the deeds, erred in failing to hold, as matter of law, that Hewitt's standing in a court of equity, with unclean hands, was such that he could not be allowed to avail himself of any such defense against the consequences of his proved wrong-doing, as that growing out of the equitable doctrine of laches.

Wherefore, appellants pray that the decree of the court below, be reversed, and that this cause be remanded with directions to enter a decree in favor of complainants establishing their respective rights to an undivided one-eighth interest each in the property in controversy, and to take an account of what may be due to them from defendants or any or either of them for

their shares of the profits of the said property, or that this court may enter such decree as to it shall seem proper and equity may require.

W. B. CHILDERS,
F. W. CLANCY,
Attorneys for Appellants.

POINTS AND AUTHORITIES.

It is to be observed from the statement of facts hereinbefore set forth, that, at this time, in this court, it is not necessary to discuss the merits of complainants' case as set out in their bill, as that matter is fully settled by the findings of the court below which show beyond all doubt that the complainants certainly were at one time fully entitled to all that they seek in the present litigation; and the main question to be considered is as to whether by their own conduct they have cut themselves off from any standing in court in this suit.

We propose, however, first to show that the agreement set forth in the bill of complaint and found by the court, constituted a mining partnership for a definite, limited purpose, which partnership has never been dissolved; and that the finding that complainants after 1885 did not contribute to the development of the property, is immaterial as they were under no obligation so to contribute.

We propose to show, also, that the circumstances of the present case, as found by the court, are such that there is no room for the application of the doctrine of laches, and that even if there were, the equitable doctrine of laches with regard to this class of cases, has been entirely wiped out by statutory enactment and no delay short of the statutory period of ten years will bar such a suit as this one.

We will then briefly consider the opinion of the supreme court of New Mexico and point out wherein it

fails to meet the argument of appellants, and wherein it errs in resting the decision upon a statute of limitations which was never pleaded by defendants, and which, if pleaded, would have been inapplicable.

FIRST POINT.

The agreement of 1883 created a mining partnership between all the parties thereto, with one of them, Hewitt, as trustee to hold the legal title for the benefit of the others.

The bill of complaint asserts, the answer denies, and the courts below find, that Hewitt was trustee for all interested. Undoubtedly the trust relation was established and clearly recognized.

That the arrangement between the parties constituted a mining partnership will be clear by reference to any authority on the subject, although this partnership was limited in extent, and clearly terminable by Hewitt's making deed as he agreed.

Manville vs. Parks, 15 *Mining Rep.*, 656; 7 *Colo.*, 128.

Hirbour vs. Reeding, 11 *Mining Rep.*, 514; 3 *Mont.*, 15.

Skillman vs. Lachman, 23 *Cal.*, 203.

Settembre vs. Putnam, 11 *Mining Rep.*, 425; 30 *Cal.*, 490.

That such an agreement is not within the statute of frauds is well settled.

Munley vs. Ennis, 2 *Colo.*, 300.

Meyiette vs. Brennan, 20 *Colo.*, 242.

Hirbour vs. Reeding, 3 *Mont.*, 15.

Raymond vs. Johnson, 17 Wash., 232.
Moritz vs. Lavelle, 77 Cal., 10.

But if it were, complete performance by complainants, as found by the courts below, would be sufficient to avoid the effect of the statute.

There never has been any dissolution of this partnership or any settlement or adjustment of the partnership affairs or any division of the partnership property. The unprincipled conduct of Hewitt as found by the courts below can have no effect upon the rights of his co-partners. Had he been honest in his claim that the Pattersons were entitled to nothing under the partnership agreement, the courts were open to him for the assertion of his claims, and he could have brought suit for a dissolution of the partnership and accounting, but no such suit was ever brought by him or any of the defendants, and they now set up that complainants are in fault. Partners cannot be allowed by sitting still in this manner, to absorb partnership property. If any one has been guilty of laches and neglect, it is Hewitt rather than the complainants. The courts have found that the duty rested on him of making deeds to the complainants, and that he neglected and refused to discharge that duty. Had he honestly performed what he had agreed to do, he would then have some standing in a court of equity to complain if the Pattersons had taken no further part in the development of the property, but he is clearly in no position to invoke the interposition of a purely equitable doctrine to protect him

in the possession of property to which he holds the title only through a violation of his agreement.

It may be suggested in answer to this argument, that the bill of complaint does not in terms declare that the agreement constituted a partnership, and that it does not pray for a dissolution of the partnership. The statement that a partnership existed or that any agreement made created a partnership, is the allegation of a mere conclusion of law, and, therefore, unnecessary. The complaint sets out the facts of the agreement quite fully, and the courts have found the facts to be substantially as stated in the bill. If those facts constitute a partnership as matter of law, any court at any stage of the proceedings can properly so hold.

As to the objection that the bill does not pray the dissolution of the partnership, it is sufficient to say that the bill contains a prayer for general relief, and it is the settled doctrine of courts of equity that under such a prayer any relief consistent with the case stated in the bill of complaint can be given, although not specifically prayed for.

Texas vs. Hardenberg, 10 *Wall.*, 85 *et seq.*
Tayloe vs. Ins. Co., 9 *How.*, 406.
Jones vs. Van Doren, 130 *U. S.*, 692.
Hall vs. Lonkey, 57 *Cal.*, 80.

SECOND POINT.

Complainants were under no obligation to contribute to the development of the property.

This point is made, because the courts below, in the 16th and 21st findings of fact, set out that after Henry

Patterson left New Mexico in April, 1885, neither he nor the other complainant contributed any means or labor for the development or improvement of the property, and it appears from the opinion of the supreme court of New Mexico, that this was one of the principal considerations which led that court to its decision adverse to complainants. In that opinion, the court even comments upon the failure of complainants to contribute to the performance of assessment work required to sustain the possessory title prior to patent. This is extraordinary in view of a distinct adjudication by this court, which makes it plain that the Pattersons could not be called upon to contribute even to the assessment work,—an adjudication to which the attention of the territorial supreme court was distinctly called.

Turner vs. Sawyer, 150 *U. S.*, 583-4.

It is to be noted, as appears from defendants' answer, that Hewitt made an attempt to "advertise out" the complainants, but the case above cited made this such an immaterial matter, that no finding was made by either of the courts below as to the advertising.

Had Hewitt honestly complied with his agreement, and executed and delivered deeds to the Pattersons when the deeds became due, they would have been vested with title so that they would have been liable for their portion of the annual assessment work. That would, however, have been the full extent of their liability to their co-owners if the deeds had been made. There can be no doubt that if one or more of several

tenants in common of an unpatented mining claim, chooose to expend large or any amounts of money in development or other work, no liability rests upon the other owners to contribute to such work or to reimburse those owners who choose to make such expenditures.

Moreover, it does not appear that complainants were ever called upon to contribute anything to any work upon the property, or that they ever had any opportunity or would have been permitted by Hewitt and Watson so to contribute.

It is respectfully submitted that these findings of the court below, to which the supreme court of the territory appears to attach great importance, were entirely immaterial. It is not made to appear that complainants knew anything whatever about the expenditures being made on the property after the spring of 1885, but if they had, their failure to join with defendants could work no forfeiture of their interests.

THIRD POINT.

The utmost effect that can be given to the court's findings against complainants is that they delayed the assertion of their rights.

A careful examination of all of the findings of the court after the 12th finding, will show that nothing is imputed to the complainants beyond mere delay and neglect. There is not a single act attributed to them or to either of them by the court which would induce the defendants to believe that they, complainants, acquiesced in the shameful robbery which the court below finds, in effect, that Watson and Hewitt combined to

perpetrate. Nothing was ever done by complainants or by either of them which could have induced the defendants to expend a dollar more on the property than they otherwise would. As we will hereinafter show, these findings thus lack one of the most important and essential ingredients of a case to which the equitable doctrine of laches should be applied.

FOURTH POINT.

There is no room for the application of the doctrine of laches in the present case.

It is clear that the solution of this question may turn upon the application of the New Mexican ten year statute of limitations; but we contend that no matter what construction is given to that staute, or if the statute be disregarded, the complainants cannot be considered as barred in the present case. It will be convenient to consider this question under three sub-headings:

A.

Nothing less than the lapse of ten years can bar complainants.

The argument would seem to be strong that when a legislature passes a statute of limitation applicable to equity and law alike, it should be enforced and followed precisely the same in both jurisdictions, and that the defense of laches and staleness of claims is no longer permissible. Otherwise, the judge substitutes for the legislative will, his own idea as to the length of time which may or may not be sufficient to bar a complainant of his remedy. The theory upon which the opposite

view is maintained, is that courts of chancery have always had and exercised, in the absence of any statute of limitations applicable to equity cases, the power of refusing to entertain stale claims, and that, unless there is an express legislative declaration that that power is taken away, it must be considered as continuing notwithstanding the enactment of a statute of limitations for the government of those courts. This is illogical and unreasonable,—an artificial and specious kind of reasoning by which it is sought to defeat the obvious legislative intent.

The statute of New Mexico in question is as follows:

> No person or persons, nor their children or heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within ten years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued, and that all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments shall be had and sued within ten years next after the title or cause of action or suits accrued or fallen, and at no time after the ten years shall have passed: *Provided*, That if any person or persons that is or shall be entitled to commence and prosecute such suit or action in law or equity be or shall be, at the time of said right or title first accrued, come or fallen, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond the limits of the United States and the territories thereof, that then such person or persons, his, her or their children, heirs, or assigns, shall and may, notwithstanding the said ten years be expired, bring his or her suit or action, as he, she or they might have done before

> the passage of this act, so as such person or persons, his, her or their children, heirs or assigns, shall within three years next after his, her or their full age, discoverture, coming of sound mind, enlargement out of prison, coming into the United States or the territories thereof, or death, take benefit of and commence such suit, at no time after the said three years: *Provided, also,* That in the construction of this saving exception, no cumulative disability shall prevent this bar, but shall only apply to that or those disabilities which existed at the time when the right to sue first accrued, and to no other. *Provided, further,* That such action so commenced shall be an action prosecuted with effect and no other.
>
> *Compiled Laws of* 1897, *Sec.* 2938.

It is to be noted that, at the time of the passage of the foregoing law, in 1858, the following sections of an act of 1851 were in force:

> Sec. 5. The distinctions known to the common law of England and the United States between courts of chancery or equity, and of courts of common law, and the distinctive jurisdiction of said courts in regard to the subject matter in controversy, shall not be regarded or recognized in the practice of the courts of said Territory.
>
> Sec. 6. The names and distinctions between different actions as known to the common law of England and the United States shall not be deemed material by the courts of said Territory, and all matters of complaint or defence between the parties of a like nature may be joined respectively in the petition or answer.
>
> *Compiled Laws of* 1865, *p.* 192.

The same legislative intent to make statutory limitations apply to suits in equity as well as actions at law,

is to be found in the statute of 1880, which appears as Sections 2913 to 2932 of the Compiled Laws of 1897. In Section 2913, it is said that "The following suits or actions may be brought within the time hereinafter limited respectively after their causes accrue, and not afterwards." By using the words "suits or actions", which are technically applicable to equitable and law cases respectively, the legislative intent is apparent. Section 2916 refers, among other things, to suits or actions brought "for relief upon the ground of fraud," which covers a large field of equitable jurisprudence. Section 2918 refers to actions for "relief on the ground of fraud or mistake." Section 2930 contains a declaration that none of the provisions of the act "shall run against causes of actions arising out of trusts when the defendant has fraudulently concealed the cause of action."

We will first consider our statute as merely prescribing a limitation beyond which suits in equity cannot be brought, contending that, even if it contained no more, complainants have the full period fixed, within which to sue; and we will then show that the language of the statute distinctly authorizes such a suit at any time within ten years. Under either view, the legislature has done away with the defense of laches.

Considered as a statute of mere limitation, it seems desirable to present the question in the light of precedent. We will, therefore, briefly submit a few of the authorities which support our position.

At some time prior to 1839, a statute was enacted

in the state of New York which fixed a ten years' period of limitation as to suits of exclusive equity cognizance. With this statute in force, Vice-Chancellor Whittlesey held that the lapse of five years after the rendition of a judgment and return of execution prior to the filing of a creditor's bill, made the demand a stale one, not to be countenanced by a court of equity.

Storms vs. Ruggles, Clark's Ch., 149.

If this ruling had been allowed to stand, it would be a strong one in favor of defendant in the present case, but in a later case Chancellor Walworth declared that *Storms vs. Ruggles* had frequently been overruled. He uses the following language:

> After the complainant has once exhausted his remedy at law by the return unsatisfied of an execution which has been issued to the proper county, the statute gives him the right to come here for the purpose of reaching the equitable interests and things in action of the defendant. And I know of no limitation of that right, short of the ten years which the statute has fixed as the time within which suits purely of equitable cognizance must be brought in this court.

Corning vs. Stebbins, 1 *Barb. Ch.*, 591.

In another case where a bill was filed for the purpose of compelling the execution of a conveyance by defendants, the right to such conveyance had arisen in the year 1813, and the bill was filed in April, 1835. The person entitled to the deed, however, remained in possession of the property until 1829, when he was dispossessed and brought his bill six years later. These facts appear in the decision of Assistant Vice-Chancel-

lor Murray Hoffman, and he held that no rule of limitation could run against complainant while he held the possession.

Varick vs. Edwards, Hoffman's Ch., 417.

The same case coming before Chancellor Walworth, he disposed of the question in the following language:

> The equitable owner of the premises was in possession of the property, under this deed, at the death of Joseph Eden. And not having been disturbed in such possession until he, or those claiming under him, were turned out of possession by the holder of the legal title, under the judgment in ejectment, in 1829, time was not a bar to the complainant's suit in equity; nor did the statute of limitations commence running until such eviction. The complainants having no remedy at law, their right in equity could not be barred except by the ten years' limitation as to suits of exclusive equity cognizance, prescribed by the revised statutes; and this suit was brought within the ten years.

Varick vs. Edwards, 11 *Paige's Ch.*, 291.

In the state of Mississippi there is a statute which appears to be similar to ours, and in a recent case counsel for defendant urged in the supreme court the same arguments that are set up in the present case by counsel for defendants, but the court disposed of the contention in the following language:

> Finally it is contended by counsel for appellant that, as ten years, lacking only four days, intervened between the death of N. P. Ragan, the father, and the date of the institution of this suit, a court of equity, in the exercise of its own inherent powers, independently of the statute of limitations, may and should refuse relief, on the ground of discouraging stale claims, or gross laches.

Much and excellent authority is cited by counsel in support of this proposition, but it has been decided that there is no such thing as a stale claim, properly so called, in this state; and by positive law, the statute of limitation is to be applied in our courts of equity as in our courts of law. With us no claim is barred until the limitation of the statute has accrued.

Hill vs. Nash, 19 *Southern*, 710; 73 *Miss.*, 862.

Since the complainant might have brought an action at law against the defendant, his cause of action does not rest upon the "existence of a trust not cognizable by the courts of the common law;" and it is not controlled by the provision of the Section 2763 of the code, limiting the period of ten years within which suit may be brought. It is governed by Section 2762 which declares that "whenever there be a concurrent jurisdiction in the courts of the common law and in the courts of equity, of any cause of action, the provisions of this chapter, limiting the time for the commencement of a suit for such cause of action in a court at common law, shall apply to all suits brought for the same cause of action in a court of equity."

Washington vs. Soria, 19 *Southern*, 487.

This case shows the legislative language making the Mississippi statute applicable to equity as well as to law, and it certainly is no stronger than the language of our own statute in Sec. 2938 of the Compiled Laws of 1897, originally enacted in 1858, at a time when all distinctions between law and equity and the separation of cases peculiar to the two jurisdictions had been done away with, as shown by quotation hereinbefore made.

Compiled Laws of 1865, *Sections* 5 *and* 6, *p.* 192.

This question does not appear ever to have been decided in this court, but there are two cases which are interesting. In one case the defense was set up of "laches, staleness of claim, and the statute of limitation of the state of Oregon." The suit was one in equity to foreclose mortgages on real estate, and the court goes on to show that the original demands upon the debt were not barred by the Oregon statute, and then proceeds as follows:

> The question of laches and staleness of claim virtually falls with that of the defense of the statute of limitations. So long as the demands secured were not barred by the statute of limitations there could be no laches in prosecuting a suit upon the mortgages to enforce those demands.
>
> *Cross vs. Allen,* 141 *U. S.,* 537.

The precise question was distinctly raised by counsel in the other case, *Bryan vs Kales,* which came up from the Territory of Arizona. The court did not pass upon it because it was not necessary, it being held that if the statute governed courts of equity as well as courts of law, the action was not barred by limitation, and if, as contended by defendants, a court of equity might deny relief because of laches, still there was no such laches as would bar the complainant.

Bryan vs. Kales, 134 *U. S.,* 126.

So far as we have had opportunity for examination, there is but one case which, *prima facie,* appears opposed to our views, and that is *Calhounn vs. Delhi,* 24 *Northeastern,* 27. Other cases cited by defendants in the territorial supreme court, and by that court in its

opinion, do not decide the point here urged, and even the *Calhoun vs. Delhi* case, when considered in the light of the New York statute, which is entirely different from that of New Mexico, cannot be taken as closely applicable. This is shown under the last heading of this brief.

B.

Our statute expressly provides in effect that no suit shall be barred within ten years.

We have thus far discussed the construction of the New Mexican statute, upon the idea that it does not attempt to enact that a cause of purely equitable nature shall be maintained if the same shall be brought within ten years, but only that it shall not be maintained after the lapse of ten years. If that were all that our statute contained, still the foregoing argument would be sound and convincing; but we now propose to show that the statute contains more, and expressly sets out that for which we contend.

By reference to Section 2938 of the Compiled Laws of 1897, it will be seen that the effective portion of it, preceding the provisos and exceptions, so far as it relates to suits in equity is, in substance, as follows:

> No person shall maintain any suit in equity for any lands but within ten years next after his right to maintain such suit shall have accrued, and all suits in equity for the recovery of any lands shall be sued within ten years next after the title or cause of suit accrued, and at no time after the ten years shall have expired.

If the law stopped at the first place where the word "accrued" appears, it might be urged with more plausi-

bility that it is what defendants have claimed and what the court below held; but the following clause shows that something more was intended by the legislature. To adopt the construction for which defendants contend, it is necessary to hold that this second clause is superfluous and meaningless, which is in violation of one of the cardinal rules for the construction and interpretation of statutes.

> In the construction of a statute, every part of it must be viewed in connection with the whole, so as to make all its parts harmonize if practicable, and give a sensible and intelligent effect to each. It is not to be presumed that the legislature intended any part of a statute to be without meaning.
>
> *Potter's Dwarris on Stat.*, 144-5.

This rule has been more clearly and better stated by this court:

> Every statute must be construed from the words in it, and that construction is to be preferred which gives to all of them an operative meaning.
>
> *Early vs. Doe*, 16 *How.*, 617.
>
> *Postmaster-General vs. Early*, 12 *Wheat.*, 152.
>
> *U. S. vs. Gooding*, 12 *Wheat.*, 477.
>
> *Market Co. vs. Hoffman*, 101 *U. S.*, 115-6.
>
> *Allen vs. Louisiana*, 103 *U. S.*, 84-5.
>
> *Montclair vs. Ramsdell*, 107 *U. S.*, 152.
>
> *U. S. vs. Fisher*, 109 *U. S.*, 145.

A careful examination of the language of the statute, with the purpose of giving full meaning to every word of the law, must convince any unprejudiced mind

that the law-makers had in view the destruction of the doctrine of laches and stale claims within the statutory period of limitations. If in the latter clause there had been inserted before the phrase "within ten years" the words "at any time," the meaning would have been unmistakable, but even without those words no effect can be given to what is really contained in the statute, except by holding that all suits shall be maintained if brought at any time within the ten years.

This view is strengthened by the strong and positive language of the proviso with regard to persons under disabilities which declares that such persons "shall and may, notwithstanding the ten years be expired, bring his or her suit or action."

If we thus give effect to what was the undoubted obvious intent of the legislature, and that intent, ascertained from the statute, of course, must govern, there can be no doubt as to the condition of the law in New Mexico. If we do not give the language this construction, we impute folly to the legislature in using superfluous and meaningless language, which is a violation of a well-known rule of construction.

C.

If it can be held that such a case as this can be barred in less than ten years, mere delay for less than the statutory period is not sufficient.

There is no authority which can be discovered against this position, no matter what the construction placed on statutes similar to ours. In the absence of

such a statute, there is no doubt that mere delay, unexplained, has been held to be sufficient to bar complainants in a court of equity, but no court has thus held in the face of such a statute. It is undoubtedly true that some courts have held that delay accompanied by other positive affirmative fact, indicating acquiescence, abandonment, fraud, express or implied, or deception, might be sufficient although less than the statutory period of limitation. We are necessarily led to a general consideration of the law of laches and we find that the term covers a good deal more than mere delay. It may be stated as a general proposition in harmony with all the adjudications on the subject, that the defense of laches will be sustained only when one or more of the following conditions exist:

1. When, owing to lapse of time and the death of parties and witnesses, the facts have become obscured and evidence has been lost so that the truth cannot be made manifest;

2. When, owing to change of parties, the coming in of innocent purchasers for value or other like changes, it would be inequitable to permit complainant to maintain his claim;

3. When there have been changes in the condition or value of the popedty, brought about by the labor or expenditure of defendant, induced by the culpable silence or acquiescence of complainant, so that it would be inequitable to permit the complainant to assert his original rights.

These are the reasons for the equitable doctrine of laches, and it is hardly necessary to cite cases in support of this statement of them. In the absence of a statute like ours, then, delay alone, unexplained, is

sufficient to justify a court in denying relief to a complainant. With such a statute as ours, mere delay is not sufficient unless accompanied by other acts of complainant or circumstances surrounding the case which make it inequitable to give the relief asked and impossible to compensate defendant for the injury which might thereby be inflicted. We assert that there is nothing in the circumstances of the present case which make it inequitable to give the complainants the relief to which they are manifestly entitled under the findings.

It has been repeatedly asserted by this court that no general rule as to laches can be laid down which would control in all cases, but each case must be decided upon its own peculiar circumstances; and in withholding or granting relief where the defense of laches has been interposed, the court lays great stress upon the presence or absence of special circumstances which make it inequitable or otherwise to grant what complainants ask. A few quotations will show this:

> No rule of law is better settled than that a court of equity will not aid a party whose application is destitute of conscience, good faith and reasonable diligence, but will discourage stale demands, for the peace of society, by refusing to interfere where there have been gross laches in prosecuting rights, or where long acquiescence in the assertion of adverse rights has occurred. The rule is peculiarly applicable where the difficulty of doing entire justice arises through the death of the principal participants in the transactions complained of, or of the witness or witnesses, or by reason of the original transactions having become so ob-

scured by time as to render the ascertainment of the exact facts impossible. Each case must necessarily be governed by its own circumstances, since, though the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in value, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like.

Hammond vs. Hopkins, 143 *U. S.*, 250.

And the question of laches turns not simply upon the number of years which have elapsed between the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years. The cases are many in which this defense has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party has good reason to believe that that the alleged rights are worthless or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them.

Galliher vs. Cadwell, 145 *U. S.*, 368.

The length of time during which the party neglects the assertion of his rights, which must pass

in order to show laches, varies with the peculiar circumstances of each case, and is not like the matter of limitations, subject to an arbitray rule. It is an equitable defense controlled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the rights such, that it would be inequitable to permit the plaintiff to now assert them.

Halstead vs. Grinnan, 152 *U. S.,* 416-7.

The reason upon which the rule is based is not alone the lapse of time during which the neglect to enforce the right has existed, but the changes of condition which may have arisen during the period in which there has been neglect. In other words where a court of equity finds that the position of the parties has so changed that equitable relief cannot be afforded without doing injustice, or that the intervening rights of third persons may be destroyed or seriously impaired, it will not exert its equitable powers in order to save one from the consequences of his own neglect.

Penn. Mutual Life Ins. Co. vs. Austin, 168 *U. S..,* 698.

The property in dispute, it may well be assumed, has greatly appreciated in value since Mrs. Ordway's purchase, which was more than ten years prior to this suit. It is now too late to ask assistance from a court of equity. The relief sought cannot be given consistently with the principles of justice, or without encouraging such delay in the assertion of rights as ought not to be tolerated by courts of equity. Whether equity will interfere in cases of this character must depend upon the special circumstances of each case. Sometimes the courts act in obedience to the statutes of limitations; sometimes in analogy to them But it is now well settled that, independently of

> any limitation prescribed for the guidance of courts of law, equity may, in the exercise of its own inherent powers, refuse relief where it is sought after undue and unexplained delay, and when injustice would be done, in the particular case by granting the relief asked. It will, in such cases, decline to extricate the plaintiff from the position in which he has inexcusably placed himself, and leave him to such remedies as he may have in a court of law.
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> *Abraham vs. Ordway*, 158 *U. S.*, 420.

Let us now briefly consider whether either of the three conditions, hereinbefore set forth as necessary to sustain the defense of laches, has any existence in the present case.

1 In the present case it cannot be contended that there has been any such lapse of time, and death of parties or witnesses as will so obscure the facts as to make them impossible of ascertainment. So far as the record discloses every one of the original parties to the compromise agreement is alive and accessible—at least the contrary of this has not been shown. All of the principal parties to that agreement are now parties to this suit. The evidence of no witness has been lost, although the opinion of the territorial supreme court, at pages 46 and 53 of the record, speaks of the absence of a witness named Burgess, but it appears from that opinion that Burgess' testimony would not have thrown any light on the original agreement or the acts of the parties under it, as he did not come on the scene until after the completion of work under that agreement. Moreover, the court was in no way embarrassed by his absence and

had no difficulty in finding the material facts as to the transactions about which there was any controversy.

2 There has been no change of parties interested in the property which can make it inequitable to deny complainants the relief which they ask. It is shown by the findings that there have not come in any new and innocent holders for value whom it is the duty of the court to protect. It is shown by the findings that, down to the time of taking the testimony, the holding of stock in the defendant company had not changed. Watson represented one-third, Hewitt onethird, and Fergusson onethird. These three have been parties from the beginning and cannot claim to have become owners or holders or claimants of the property in good faith for value in consequence of any act or omission on the part of complainants.

3 This brings us to the consideration of the third ground of the doctrine of laches, and that is as to the changed condition of the property. It would be idle to deny that the record discloses a change in the condition of the property, although the findings are not as definite and complete on this subject as they might be. They are in substance that Hewitt, Watson and Fergusson did much work and spent mcch money on the property, and in 1890 discovered a large body of rich ore from which they have taken out several hundred thousand dollars. It cannot be said, however, that defendants proceeded with their operations in ignorance of the rights of complainants. They knew all about them, and if they chose to proceed as they did, they

ought not now to be heard to say that there is anything inequitable in the assertion and maintenance of complainants' claims. No court would have maintained any suit brought to get rid of complainants, or to compel them to contribute to the development. The original partnership agreement under the compromise of 1883, was clarly limited as to its extent. It is obvious that the other partners could have no claim against complainants on account of any work which they might choose to do beyond that limit. There is no finding that their operations were induced by any culpable act, or failure to act, on the part of complainants.

If Watson and Hewitt chose to expend money in finding pay mineral, that would give them no claim against their co-partners in the absence of some agreement to that effect. No such claim would exist even if the deeds had all been made and the various equitable owners had been invested with their proportionate shares of the legal title and had become tenants in common. The only claim which even then could have been set up would have been as to their respective shares of the annual assessment work, and any expenditure above that amount which any owner chose to make, would have been at his own risk.

We will briefly call attention to a few authorities, selected from a greater number, which will show the correctness of the foregoing argument. First, as to the general proposition that mere delay or silence on the part of complainants is not enough to bar them, no

matter how long continued, if it does not extend beyond the statutory period of limitation.

There is no pretense that the defendants did not know their title and their rights quite as well as Mrs. Smith, and none that she in any way induced them to make this expenditure. She was simply passive in the matter and failed to object to the defendants doing what they did do. In this there was no element of estoppel. To constitute it the person sought to be estopped must do some act or make some admission with an intention of influencing the conduct of another, or that he had reason to believe would influence his conduct, and which act or admission is inconsistent with the claim he proposes now to make. The other party, too, must have acted upon the strength of such admission or conduct. See *Bowen vs. Bowen, supra,* at page 541. In cases of silence there must be not only the right but the duty to speak before a failure so to do can estop the owner. There was no such duty here. See *Viele vs. Judson,* 82 *N. Y.* 32.

Rubber Co. vs. Rothery, 107 *N. Y.,* 315-6.

Nor was there any case presented by the prayer that amounted to an estoppel. The principle has long been settled that a party is not estopped by his silence unless it has misled another to his hurt. *Hill vs. Epley,* 31 *Pa.,* 334.

Railroad Co. vs. Dubois, 12 *Wall.,* 64.

Where an express statute of limitation applies to a suit in equity, mere delay to commence the suit for a period less than that of the statute of limitations is never a reason for dismissing the proceeding.

And when the defendant relies on mere delay and his own adverse use, the statutory period hav-

ing expired, he must plead the statute. A party claiming the right to use water by adverse possession for the statutory time must set up the same as a defense in his answer. (*American Co. vs. Bradford, 27 Cal., 360.*)

Appellants contend that they had five years after their cause of action accrued within which to bring this action. It may be conceded, however, for all purposes of this case, that the code of civil procedure limited them to four years.

It has been repeatedly decided in this state that Section 343 of the code of civil procedure ("An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued") applies as well to suits in equity as to actions at law. The same effects positive and negative, follow from Section 343 as from other sections of the code, prescribing the periods within which actions may and must be commenced. With reference to other limitations, a party cannot be refused a hearing if he shall bring his action within the period named; and as to suits to which Section 343 is applicable, mere lapse of time, less than four years, is not ground for defense. Throughout the code suits in equity are called actions. Sections 346 and 347 expressly relate to certain suits in equity. Section 307 declares "there is but one form of civil action," etc. That section does not abolish the distinction recognized by the constitution between law and equity, but it indicates the legislative intent that the subsequent provisions of the code should be applicable to legal and equitable proceedings. The word "hereinbefore" in Section 343 has never been held to limit its operation to actions at law, but it has often been held to the contrary.

Lux vs. Haggin, 69 Cal., 267.

We invite particular attention to this case of *Lux vs Haggin*, as it goes on to discuss at great length the argument in favor of a court of equity declining to interfere by way of injunction, when there had been laches although the statutory period of limitation has not expired. Pages 268 and 284.

Wood on Limitation, Secs. 61, 62 and 63.

Kline vs. Vogel, 90 Mo., 250-1.

Perry on Trusts, Sec. 850.

The doctrine of staleness of demand relied on as a defense in this case cannot, under the facts shown in this bill be sustained. Laches, as has been well said, does not, like limitations, grow out of the mere passage of time, but it is founded on the inequity of permitting the claim to be enforced, an inequity founded upon some change in the condition or relation of the property or the parties. *Galliher vs. Cadwell*, 145 *U. S.*, 368, 12 *Sup. Ct.*, 873. Whenever such manifest inequity does not appear, "a case does not fall within the operation of the rule, if the suit is for the recovery of property, real or personal, unless it is apparent on the face of the bill, that for the period prescribed as a bar to the corresponding legal remedies, there has been a possession hostile to the title the complainants assert. *Shorter vs. Smith*, 56 *Ala.*, 208; *Scruggs vs. Land Co.*, 86 *Ala.*, 173, 5 *South*, 440.

Waler vs. Nelson, 18 *Southern*, 155, (*Alabama.*)

The doctrine of equitable estoppel by matter in pais, has doubtless been greatly extended by the courts in modern times; yet, it is not entirely without limits, and it professes to be founded upon the principles of natural justice. The general principle now is that where the conduct of a party has been such as to induce action by another, he shall be precluded from afterwards asserting, to the pre-

judice of that other, the contrary of that of which his conduct has induced the belief. The primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential, either in the intention of the party estopped, or in the effect of the evidence which he atempts to set up. Thus, if a person positively encourages another to purchase either land or a chattel, he cannot afterwards assert any title in himself to the thing purchased, and this though he may have been ignorant of his rights when he gave the encouragement. For though in the latter case there may have been no fraudulent intent, yet the assertion of his title would operate as a fraud, as much as if there had been a fraudulent purpose. Besides the equitable principle is, that when a loss must befall one of two innocent persons, that one must bear it through whose act it was occasioned. It seems also to be well settled, that silence in some cases, will estop a party against speaking afterwards. Thus, if one suffers another to purchase and expend money upon a tract of land, and knows that that other has a mistaken opinion respecting the title to it, and does not make known his claim, he shall not afterwards be permitted to set up a claim to that land against the purchaser. His silence then becomes a fraud. But, silence without such knowledge works no estoppel. It is only when silence becomes a fraud, that it postpones: *Beauland vs. McKeen*, 4 *Casey*, 124; *Robinson vs. Justice*, 2 *Penn.*, 19; *Keeler vs. Ventuyle*, 6 *Barr*, 253. The doctrine of estoppel, by matter in pais, resting thus upon the supposed existence of a fraud, it is essential to its being allowed in any case, that it would work an injury, if the party alleged to be estopped should be permitted to set up his case. If

no one has been misled to his hurt, if no injury has arisen from the conduct, declarations or silence of a party, he will not be estopped from contradicting them even though they would be conclusive against his right if not contradicted. *Dezell vs. Odell*, 3 *Hill*, 215; *Patterson vs. Lytle*, 1 *Jones*, 53. If, therefore, the truth be known to both parties, or if they have equal means of knowledge, there can be no estoppel. Accordingly, it has been held that one is not relieved, who had the means of becoming acquainted with the extent of his rights: *Crest vs. Jack*, 3 *Watts*, 240; *Hepburn vs. McDowell*, 17 *S. & R.*, 383; and in *Knouff vs. Thompson*, 4 *Harris*, 361, it was ruled, that silence does not estop when the party's deed is on record. It should never be forgotten, that there is a wide difference between silence and encouragement.

Hill vs. Epley, 31 *Pa. State*, 333-4.

The principle invoked is, that one should be estopped from asserting a right to property, upon which he has, by his conduct, misled another, who supposed himself to be the owner, to make expenditures. It is often applied where one owning an estate, stands by and sees another erect improvements on it in the belief that he has the title or an interest in it, and does not interfere to prevent the work, or inform the party of his own title. There is in such conduct a manifest intention to deceive, or such gross negligence as to amount to constructive fraud. The owner, therefore, in such a case, will not be permitted afterwards to assert his title and recover the property, at least without making compensation for the improvements. But this salutary principle cannot be invoked by one who, at the time the improvements were made, was acquainted with the true character of his own title or with the fact that he had none.

Steel vs. Smelting Co., 106 *U. S.*, 456.

It is difficult to see where the doctrine of equitable estoppel comes in here. For the application of that doctrine there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence on his part as to amount to constructive fraud, by which another has been misled to his injury. "In all this class of cases," says Story, " the doctrine proceeds upon the ground of constructive fraud or gross negligence, which in effect implies fraud. And, therefore when the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has been accordingly laid down by a very learned judge that the cases on this subject go to this result only, that there must be positive fraud or concealment, or negligence so gross as to amount to constructive fraud." 1 *Story Eq.*, 391. To the same purport is the language of the adjudged cases. Thus it is said by the supreme court of Pennsylvania, that "the primary ground of the doctrine is, that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up." *Hill vs. Epley*, 31 *Pa. St.*, 334; *Henshaw vs. Bissell*, 18 *Wall.*, 271, (85 *U. S. XXI.*, 840); *Biddle Boggs vs. Mining Co.*, 14 *Cal.*, 368; *Davis vs Davis*, 26 *Cal.*, 23; *Com. vs. Moltz*, 10 *Pa.*, 531; *Copeland vs. Copeland*, 28 *Me.*, 539; *Delaplaine vs. Hitchcock*, 6 *Hill*, 616; *Hawes vs. Merchant*, 1 *Curt., C. C.*, 136; *Zuchtmann vs. Roberts*, 109 *Mass.*, 53. And it would seem that to the enforcement of an estoppel of this character with respect to the title of property, such as will prevent a party from asserting his legal rights, and the effect of

which will be to transfer the enjoyment of the property to another, the intention to deceive and mislead, or negligence so gross as to be culpable, should be clearly established.

Brant vs. Virginia Co., 93 *U. S.*, 336.

That one who has violated a duty which he owes to another, and thereby obtained that other's property, should be allowed to say that he may retain it because an action has not been brought promptly, even though the statute of limitations has not run, seems inequitable and unjust, and, as is shown in the case last above referred to, he will not be allowed to do so unless the party complaining has knowingly acquiesced in the conveyance, or done some affirmative act calculated to induce the belief that he does not intend to question it, or there are such facts and circumstances in the case as indicated that the action is speculative. In other words, if a court of equity can grant relief against the abuse of the relations of trust and confidence arising out of the relation of atorney and client, without injury to the defendant or other interested parties, we see no reason why a period of delay in bringing a suit less than that fixed by some statute of limitations should bar the right of complainants.

Ross vs. Payson, 43 *N. E.*, 402.

In a late case in this court, decided in February, 1899, the law is quite fully discussed, in the light of reasoning applied to the facts, and also in the light of precedent; and, perhaps more completely than ever, the idea is enforced that each case must be decided according to its own special facts and circumstances. It plainly shows that in cases where a trust is clearly established by the testimony, or where fraud is clearly proved, or where the property has not passed into the

hands of persons innocent of the fraud and without notice thereof, and lapse of time has not obscured the facts or caused the loss of testimony, relief will be granted notwithstanding great delay on the part of a complainant. All of these reasons for granting relief exist in the present case.

McIntyre vs. Pryor, 173 U. S., 53 et seq.

The case of *Johnston vs. Standard Mining Co., 148 U. S., 370*, at the first glance would appear to be a strong authority against our contention; but a little examination will disclose the fact that in addition to the mere delay and neglect of the complainant, there were other facts in the case, of the nature of those to which we have already adverted as essential to the application of the doctrine of laches. In that case the property concerning which Johnston had made a contract in 1880, had passed into the ownership of a stock corporation, of the formation of which plaintiff had knowledge and in which he expected to receive stock; and the court says that at the time of the institution of the suit a large proportion, if not a majority of the stock, had passed into the hands of innocent purchasers who were entirely ignorant of the contract. It is also declared that the plaintiff ought to have known all that was taking place with respect to the title and development of the property, as the circumstances were such as to put him on inquiry. In the present case there is no finding, and, therefore, presumably, no evidence to show that any facts were ever brought to the knowledge of the complainants prior to 1892 which were such as to put

them upon inquiry as to the development of the property. It will be readily seen that some of the most important considerations which led to the decision of the court in the Johnston case have no existence in the present litigation.

In this court relief has more frequently been denied upon the ground of change of parties so that defendants could have no knowledge of the original transactions, than upon any other.

We call special attention to *Hanner vs. Moulton,* 138 *U. S.,* 495, and *Johnston vs. Standard Mining Co.,* 148 *U. S.,* 368-9.

As we have already shown no similar state of facts exists here. The parties defendant are original parties to the transaction and up to the time of the institution of the suit and even down to January, 1896, when defendants took their proofs, there had been no substantial change in the ownership of the property, as will be seen by reference to the 18th finding of the courts below.

In the case of *Ross vs. Payson,* above cited, it is declared that the defendant cannot be injured by granting the prayer of the bill because he can "by a fair accounting be fully compensated for all the money he has expended, either in the purchase, improvement, or payment of taxes upon the land."

In like manner if the defendants in the present case have been in any way injured they can be compensated upon an accounting as to what they have done with the property. We claim, however, that what they did was

of their own volition, at their own risk, and that they have no right to bind complainants for any portion of their expenditures upon the property.

FIFTH POINT.

The unsatisfactory opinion of the Territorial Supreme Court.

The above heading naturally provokes the sarcastic comment that any opinion adverse to complainants must necessarily be very unsatisfactory, to them at least, but it is not because it is adverse that we here contend that it is unsatisfactory. We intend to assert that it is intellectually unsatisfying, because it is inaccurate and inadequate.

We are well aware that this opinion is no part of the record, and that, as has been declared by this court, it is immaterial by what process of reasoning the court below reached its conclusion.

Mobile vs. Eslava, 16 *Pet.*, 245-6;
Davis vs. Packard, 6 *Pet.*, 48;
England vs. Gebhardt, 112 *U. S.*, 506.

We cannot, however, shut our eyes to the fact that, upon appeal to this court, after an appellant has suffered two adverse decisions, one in the court of original jurisdiction and another in an appellate court, there must necessarily be some presumption in favor of the action of the lower courts against him, and it is with the hope of meeting or dissipating that presumption that we feel called upon to make some comments upon the reasoning and arguents by which the supreme court of New Mexico has attempted to support its conclusion.

We do not intend any disrespect toward that court, nor do we desire to depreciate its learning and ability; but we would not be here with this appeal if there did not appear to us reason to believe that a mistake had been made in the decision against us. We ought to say, however, that the five judges of the supreme court of New Mexico, in addition to their duties as members of the appellate court, are required to hold during the year more than fifty terms of courts of original jurisdiction in many different places scattered over an immense area, and it is not within their power to give all the time and attention to every case which its importance may demand and which they themselves would desire. We believe the present case is a conspicuous instance of this kind.

The opinion of the court will be found on pages 38 to 63 of the printed record. First comes the syllabus and then the statement of facts, both prepared by the court, the statement of facts being made up principally of the findings made by the district court. On page 44, near the foot of the page, the court begins a summary of the facts found by the district court. This summary is the foundation upon which the court bases its opinion, and from it, we select the following as instances of the inaccuracy in the opinion of which we complain, and which, as we submit, pervades the whole of it.

First, the opinion asserts that the district court found that, "if any labor was performed on behalf of C. Ewing Patterson during that time, it was by or under the direction of Henry J. Patterson and

Watson as his representatives;" but nothing like this is to be found in the findings, all that there is on the subject being in the 11th and 12th findings to which attention is invited.

Second, the opinion asserts that the district court found "that demand was made upon Hewitt for the execution of deeds conveying the interests of the Pattersons in said property to them as early as April, 1885"; but this is directly contradicted, so far as C. Ewing Patterson is concerned, by the 15th finding.

Third, the opinion asserts that the district court found that "the defendant, Burgess, attorney in fact, "did not "perfom any labor or contribute any money towards the assessment work or the development of the property in the absence of the Pattersons"; when there is no finding that Burgess was attorney in fact for anybody, or that he did, or did not, do anything, the only reference to him being in the 22nd finidng where he is mentioned as "agent" of Henry Patterson, and he was not a defendant.

Fourth, the oponion asserts that the district court found "that the property was of little known value, but on the contrary its value prior to the year 1890 was entirely uncertain and speculative"; but a careful examination will disclose no such finding whatever.

Fifth, the opinion asserts that the district court found "that during the fall of 1890 the development work done by Hewitt, Watson and Fergusson and others, not including the appellants, resulted in the discovery of large bodies of rich ore in the mines located by Hewitt and referred to as 'The Old Abe' Mine; that the property at that time rapidly advanced in value and became of great certain value"; when as matter of fact no such finding was ever made. The court carefully avoided any finding that the discovery of rich ore in 1890, "re-

sulted" from the development work done by Hewitt et al. probably because the judge was unwilling to pass on the issue raised by defendants' denial of the allegation in the 4th paragraph of the bill of complaint, that complainants in 1883 discovered the lode upon which the operations of the defendant company have been carried on, and also because he was not able to say that the much talked-of expenditures of time and money prior to 1890 had been of any value whatever to the property. An inspection of the careful wording of the 16th and 17th findings will show the correctness of these views. For all that appears, the work done from 1885 to 1890 was of the most futile, foolish and worthless character, and did not contribute in the slightest to the improvement of the property.

Sixth, the opinion asserts that the district court found "that the agent Burgess, left the Territory of New Mexico prior to the trial of this cause, and his place of residence being unknown, his attendance could not be procured as a witness, and his testimony could not be obtained at the trial of this cause"; when there is absolutely no finding whatever on this subject. Moreover, there is nothing in the record to show that it is of any importance, and the little which appears in another part of the opinion (pages 53-4) shows its immaterial character.

We respectfully submit that the foregoing indicates a strong though unconscious bias and prejudice on the part of the writer of the opinion, which has been productive of manifest error and which tends to impair confidence in any part of the opinion.

We invite attention to the fact that this opinion fails to give any consideration whatever to the point which

was made in the territorial court, the same as here, that the agreement found in the district court was one of partnership between the parties to it. It must be assumed that it was not thought worthy of serious or any consideration.

The opinion devotes a great deal of space to the establishment of the undisputed doctrine that each case in which the defense of laches is interposed, must be decided upon its own circumstances, and that no general rule can be laid down which will govern all cases. It does not, however, take any distinct notice of the position of appellants that mere delay in the assertion of rights is not sufficient to bar a suitor in equity, and that in this case the findings of fact impute to complainants nothing more than mere delay. This omission is undoubtedly to be attributed to the fact that the court could discover nothing in the conduct of compplainants which could have misled or deceived defendants or induced them to do any act from which they might suffer injury.

The court evidently recognized the accuracy and justice of the proposition, which is set out under subheading "C" of the 4th point of this brief, as to the conditions which must exist before the defense of laches can be sustained, but the opinion does not distinctly and clearly set out this doctrine. It does, however, make some effort to meet those conditions. The first, as we have stated it, is that the defense will be sustained "when, owing to lapse of time and the death

of parties and witnesses, facts have become obscured and evidence has been lost, so that the truth cannot be made manifest."

In its attempt to show that this condition existed, the court felt compelled to speak as follows:

> Again, a change in the relation of the parties and the death or absence of witnesses are considered by the courts of equity in applying laches to stale claims. It is true that in this case death did not intervene to prevent the production of material testimony, but it is a fact that the witness, Burgess, who remained in the vicinity of the property and who knew the appellees were developing the property, and who acted as the agent of one or both of the appellants, and whom the testimony shows to have been in correspondence with one or both of the appellants, left the Territory in 1891, and his whereabouts being unknown, his testimony could not be obtained in this case, and yet it is apparent that his testimony would have been of great materiality and value. If his place of residence was known to the appellants, it was not divulged, and, therefore, his testimony was not available even by deposition, and the power of attorney, which constituted his authority to act, as testified by Henry J. Patterson, was also absent and could not be produced in evidence. The long delay in the commencement of this suit undoubtedly produced this result, for had the suit been commenced at any time up to and including the year 1890, the testimony of Burgess could have been produced, as he was within the jurisdiction of the court. (*Pages* 53-4 *of Record.*)

Much of this is as to matters not in the record on this appeal. It is plain, however, that this single witness, of the loss of whose evidence so much is sought

to be made, was no party to the transactions between complainants and defendants out of which this litigation arose, and that his absence in no way disabled the court from making full and complete findings as to everything necessary to fix the respective rights of the parties. We do not feel at liberty to criticise this or other portions of the opinion as to any inaccuracies in statements of fact, as we are limited here to those facts which are shown by the record.

The second of the conditions, of which one or more must exist in order that the defense of laches be sustained, is "when, owing to change of parties, the coming in of innocent purchasers for value or other like changes, it would be inequitable to permit complainant to maintain his claim." As to this, the learned court below in its opinion, uses the following language:

> Neither can it be said that there was no change in the relation of the parties to the property prior to the commencement of this suit, because the Old Abe corporation was organized in 1892, and the whole, or almost the entire property, was conveyed to it by Hewitt, the locator of the property, and those to whom he had conveyed, and the company had issued stock in lieu of the individual interests in the property. It is true that the Old Abe Mining Company was organized by Hewitt, Fergusson, Watson and others, and the stock was divided between them, and doubtless remained so up to the time of the trial, but at least the appellee, Mathew Hoyle, came into the possession of his rights by a conveyance from Watson, dated June 9, 1890, and Hoyle conveyed five forty-eights (5-48) of the property to the Old Abe Company, retaining one forty-eighth (1-48). He therefore

> acquired whatever interest he had in 1890 prior to the enhancement of the value of the property and conveyed to the company a portion of his holdings after the property had largely increased in value. So that while the change of the relation of the parties to the title was not radical there was a change which, owing to the enhancement of the value of the property, became an important one, when the prayer of the bill, as to the relief sought, is considered. (*Page* 54 *of Record.*)

The illogical part of this is to be found in its reference to the prayer for relief in the bill of complaint. There being a prayer for general relief, the specific relief prayed for is unimportant if the facts found make a case entitling complainants to the assistance of a court of equity. It is to be noted, however, as we have heretofore pointed out, that even in this statement in the opinion of the court, there is no substantial change of parties shown which would in any way interfere with giving complainants all that they pray without interfering with the rights of any innocent holders. There is nothing in the findings about the defendant, Hoyle, who is referred to in the opinion, but it is still clear that the other defendants retain enough of the property to make it possible to give complainants their rights without interfering with Hoyle, and it is to be noted that even in the prayer for relief complainants ask that the court should make such provision in its decree as might be necessary and proper for the protection of stockholders other than Hewitt. There is no practical difficulty in the way of doing this, so that we insist that the opinion of the court below fails entirely to show that

there has been such change of parties as to make it inequitable to permit complainants to maintain their claim.

The last of the three conditions referred to, is "when there have been changes in the condition or value of the property brought about by the labor or expenditure of defendant induced by the culpable silence or acquiescence of complainant, so that it would be inequitable to permit complainant to assert his original rights." There is a great deal said in the opinion of the court below, on pages 51 to 53, about changes in the value of the property, which it is unnecessary to attempt to quote here. Much of what is there said, goes far beyond anything to be found in the findings of fact. Those findings do not in terms declare that there was any change in the value of the property, or that any such change had been brought about by the exertions of defendants. But this is unimportant, because with all the multitude of words on this subject in the opinion of the court, at the pages last cited, and on pages 55 and 56, no act or omission on the part of complainants is pointed out which misled or deceived or imposed on defendants; or, to state it defferently, there is nothing to show "any labor or expenditure of defendants induced by the culpable silence or acquiescence of complainants." Neither the findings of the courts nor the opinion of the supreme court, contain a hint that defendants were induced or led to perform any labor or make any expenditure upon the property by the failure of complainants to assert their rights at an earlier time.

We submit that these criticisms should be convincing, that neither one of the conditions, one or more of which is essential for the defense of laches, existed in the present case, for it must be conceded that the opinion of the territorial supreme court says all that possibly can be said against us, and as we believe, much more than ought to be said.

On page 57, the opinion of the court quotes our condensation of Section 2938 of the Compiled Laws of 1897, and without giving the slightest consideration to our argument that the first clause of the section would be sufficient without more, to make the statute one of mere limitation, goes on to declare an inability to see anything in this section of the statute beyond the simple provision that after ten years have elapsed, no suit can be brought for the recovery of lands in a court of law or equity. We submit that the opinion is inadequate and unsatisfactory when it pays no attention whatever to an argument of this kind.

In support of the court's construction of the statute, the opinion cites eight cases. Those cases are as follows:

Calhoun vs. Delhi &c. R. R. Co., 24 *N. E. Rep.* 27.
Mason vs. Sanford, 137 *N. Y.*, 497.
Boyer vs. East, 161 *N. Y.*, 580.
Old Colony Co. vs. Dubuque Co., 89 *Fed Rep.*, 794.
Hubbard vs. Manhattan Co., 87 *Fed Rep.*, 51.
Continental Bank vs. Heilman, 86 *Fed. Rep.*, 514.

Graff vs. Portland Town Co., 54 *Pac.*, 854.
Alsop vs. Riker, 155 *U. S.*, 448.

We respectfully submit that, with the exception of the first of these eight cases, none of them tend in any way to support the position of the court, and even in that case, when we look into the statute which is under consideration and compare it with the statute of New Mexico, the applicability of the case becomes less apparent. The New York statute is as follows:

> An action, the limitation of which is not specially prescribed in this or the last title, must be commenced within ten years after the cause of action accrues.
>
> *N. Y. Civil Code, Sec.* 388.

It has been held by the courts of New York that this section applies to suits of equitable jurisdiction, and so far as we are informed, this is the only now existing statute of limitation in New York which is so applicable. The difference between the language used in the New York statute and in that of New Mexico, does not need to be pointed out. Certainly, the New York statute contains nothing to indicate that the legislature had specially in mind the subject of cases of equitable jurisdiction or any of the peculiar doctrines of equity applicable to such cases.

The question considered in *Mason vs. Sanford* does not appear to come as near to the present case as the one first referred to. The court was considering the time within which application could be made for the revival of actions by the substitution of a representa-

tive of a deceased party, and declared that in legal actions there was no mere time limitation, while in equity actions there was a time limitation of ten years, but in both classes of cases the application to revive might be denied on account of laches, even though in an equity case the ten years might not have passed. Without going further, it is quite obvious that an entirely different set of considerations arise upon applications to revive actions from those to be applied to a simple statute of limitations.

It is safe to assert that the third of the cases cited by the court below has not the remotest applicability. In that case, the plaintiffs were absolutely barred by the terms of the New York statute of limitations. It was a case of heirs attacking the validity of a sale of real estate made while they were infants, the action having been brought eight years after the younger of the two heirs had become of age. The New York statute of limitations as to disabilities of different kinds, declares, in substance, that the time of the disability is not a part of the statutory period of limitation, except that the time so limited cannot be extended in any case more than one year after the disability ceases.

N. Y. Civil Code, Sec. 396.

The case of the *Old Colony Trust Co. vs. Dubuque Light and Traction Co.*, 89 *Fed. Rep.*, has no reference whatever to the construction of any statute of limitations, but only to a defence of laches based upon delay in bringing the suit, and the court held against the defence because it did not appear that the position and re-

lations of the parties had been changed in any substantial particular before the petition was filed.

The same thing can be said as to the case of *Hubbard vs. Manhattan Trust Company.*

In the case of the *Continental Bank vs. Heilman, 86 Fed. Rep., at page* 516, it appears that the federal court while recognizing the applicability of the Indiana statute of limitation as to the bringing of a suit by a creditor out of the state against the heirs, devisees, and distributees of a decedent, clearly holds that the jurisdiction of a federal court and the methods and principles upon which it is exercised, are not to be affected by the legislation of a state, and, therefore, inexcusable laches for less than the statutory period of limitation is a good defence in that court.

In *Graff vs. Portland Company, 54 Pacific, at pages* 856-7, it appear that the court was not considering the applicability of any statute of limitations, but only the question of laches. The nearest approach to a statute of limitations, is in the following language:

> No specific limit of time can be fixed within which the doctrine may be successfully invoked in courts of equity. It is not essential that such time should have elapsed as to make the statute of limitations effective. Mere lapse of time of itself, unless sufficient to operate as a statutory bar, may not always be adequate; but when coupled with such conditions and acts of the parties as to indicate assent, acquiescence or waiver, it may.

The last of the citations by the territorial court, is that of *Alsop vs. Riker, 155 U. S., 448.* In that case, this court, on page 460, said that it was inclined to

think that the suit could not be excluded from the operation of the statute of New York prescribing a limitation of six years, but without placing the decision upon that ground, and independently of the statute, it was said that the case was one in which a court of equity should refuse to interpose, because of laches on the part of appellant, and then follows a reiteration of the frequently expressed view, that laches may bar a suit even though less than the statutory period has elapsed. There is nothing to indicate that the court was considering any such statute as that of New Mexico.

If these citations are the best which can be made in support of the effort to ignore and disregard a large portion of the language of our statute,—and we believe they are,—it is certainly clear that the construction given by the court below, cannot rest upon precedent and authority.

On page 60 of the record, the opinion quotes Section 2916 of the Compiled Laws of New Mexico, which is a part of the statute of limitations, and reads as follows:

> Those founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified, within four years.

The learned court thereupon goes on to hold that this case is not one "for lands" or "for the recovery of lands," and is barred by Section 2916. It is well set-

tled that the bar of a statute of limitations must be set up by the defendant in some formal way in the record, in order to be available.

Buswell on Limitations, 525 *et seq.*;
13 *Encyc. P.* & *Pr.*, 181;
Sanger vs. Nightingale, 122 *U. S.*, 183;
Retzer vs. Wood, 109 *U. S.*, 187.

In the present case, no statute of limitations was pleaded by defendants, and it is too late for them to find any protection by its provisions in an appellate court; but even if this were not so, the Section 2916 above quoted, can have no application to this case. The ten year statute of limitations as to suits "for lands" or "for the recovery of lands," was passed in 1858, and was expressly preserved by the terms of the act of 1880, of which the said Section 2916 was a part, as will be seen by reference to Section 2929 of the Compiled Laws of 1897, which reads as follows:

> Sec. 2929. None of the provisions of this act shall apply to any action or suit which, by any particular statute of this territory, is limited to be commenced within a different time, nor shall this act be construed to repeal any existing statute of the territory which provides a limitation of any action; but in such cases the limitation shall be as provided by existing statutes.

It is believed that in 1880 the only territorial statutes of limitation in force, were the one year limitation as to actions of replevin, and the ten year statute above referred to. It is difficult to understand how it can be

seriously asserted that the present case is not one for the recovery of lands. If complainants are entitled to anything, they are entitled to a conveyance of the legal title to an undivided one-fourth part of the mining property embraced within the two claims located by Hewitt in 1884 under the agreement to which he and complainants were parties, and, incidentally, to an accounting by defendants as to the rents and profits.

Section 4014 of the Compiled Laws of New Mexico of 1897, a portion of the statute concerning suits to quiet title, says that "For the purposes of this act, and for all other purposes, mines shall be deemed and taken to be real estate."

It is obviously impossible for us, within any reasonable limits, fully and closely to review the opinion of the territorial supreme court. Those matters to which we have specifically called attention, may fairly be taken as samples of the whole. Much might be said of its unfairness, although, of course, unintentional and unconscious, in its statements of appellants' arguments and position,—an unfairness into which the court was probably betrayed by assertions in the brief of appellees as to what were the contentions of appellants,—but we believe that we have already said more than enough to convince the court that our case did not receive such consideration in the territorial supreme court that the adverse decision of that court can be considered as raising any reasonable presumption against the justice of our claims.

It is respectfully submitted upon the findings made by the courts below, that the decree in this case should be reversed and this case remanded to the supreme court of the Territory of New Mexico, with directions to set aside its decree and to remand the case to the district court of Lincoln county for the entry in that court of a decree in favor of complainants, in accordance with the prayer of their bill of complaint, due regard being had to the protection of the interests of innocent purchasers for value, if any there be, of any portion of the property in controversy, and for such further proceedings as may be necessary.

W. B. CHILDERS,
F. W. CLANCY,
Counsel for Appellants.

White Supreme Court U. S.
FILED
OCT 17 1904
JAMES H. McKENNEY,
Clerk.

No. [illegible] 23

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903.

C. EWING PATTERSON, ET AL.,
Appellants.

vs.

JOHN Y. HEWITT, ET AL.,
Appellees.

BRIEF FOR APPELLEES.

H. B. FERGUSSON
Attorney for Appellees.

INDUSTRIAL APPRENTICE, ALBUQUERQUE

No. 254.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1903.

C. EWING PATTERSON, ET AL.,
Appellants.

vs.

JOHN Y. HEWITT, ET AL.,
Appellees.

BRIEF FOR APPELEES.

STATEMENT.

The transcript in this case contains only the pleadings, the findings of fact and the opinion of the Supreme Court of the Territory of New Mexico, from whose judgment this appeal is taken. Appellants rest their case on the findings of fact made by the two courts

below. Those two courts agreed upon the following findings of fact, to-wit:

1. That the real estate or mining ground, known as the Old Abe mining claim, in controversy in this suit, was about the year 1881 claimed by the complainants herein, and by one of the defendants, Watson, under the locations made by them of said ground, sometime in the year 1881; that between that time, the year 1881 and the year 1883, the complainants, in conjunction with the said defendant, Watson, did a large amount of work upon the said ground, and were claiming the same as the locators thereof under the mining laws of the United States.

2. The court doth also find that the said ground was also at the said date, to-wit, between 1881 and 1883, claimed by other parties, among whom was the defendant, Hewitt, and others.

3. The court doth further find that some time prior to August, 1883, some rich ore had been discovered within the boundaries of said ground by one of the complainants, Patterson.

4. The court doth further find from the evidence that the said ground was, in August, 1883, in dispute between the complainants herein and the said Watson upon the one side, and the said other parties upon the other.

5. The court doth further find that the said complainants and the said defendant Watson, and all of the parties who were interested in said ground, held a meeting in White Oaks in August or September, 1883,

for the purpose of adjusting the difficulties then existing between them in reference to the said ground, and to endeavor if possible to arrive at an agreement whereby the interests of all parties in said ground would be protected and preserved; that at the said meeting there were present the two complainants and the defendant Watson and the defendant Hewitt, and some other persons who were interested in said ground.

6. The court doth further find, that at the said meeting it was then and there agreed by and between the complainants herein and the said defendants, William Watson and John Y. Hewitt, and the other persons who were interested in said ground, that all of the old locations then existing upon the said ground, whether made by the complainants or any of the defendants of conflicting claimants therein, should be from that date abandoned, surrendered and given up by all of the parties, and that the said ground should be taken possession of by a trustee, who should locate the said ground in his own name, and hold the same as trustee for the benefit of all the parties then interested in said ground.

7. The court doth further find that it was agreed that the said John Y. Hewitt, the defendant herein, should be and was designated and agreed upon as a trustee, with direction and authority to locate the said ground in his own name, and to hold the same as trustee for all of the parties in interest; and it was further agreed by and between the said parties claiming the said ground, as well the complainants as the defendants

Watson and Hewitt, and the other persons interested therein, that sufficient work should be done upon said ground in order to discover mineral upon the said ground, and to obtain a patent therefor; and it was further agreed that said Hewitt, as such trustee, should make a deed to each of the said parties holding an interest therein, who should contribute his part of the work and labor and expenses in doing the necessary work in order to obtain the said patent; but there was no agreement as to what should become of the interest of any one who failed to contribute his share of the expenses. It was also agreed that each of the said complainants should he contribute his share of expenses should receive a one-eighth interest in said location so made by said Hewitt, and that the said Watson should also receive an eighth interest, and the said Hewitt should also receive an eighth interest, partially on account of his services, and in part on account of his interest in the ground, and that the remainder of said property should go to the other parties who were interested therein.

8. The court doth further find, that after the said agreement was made the said Hewitt took charge of said property thereunder; that the said Watson, defendant, and one of the complainants, Patterson, superintended and directed the work upon the said mine during the year 1883 and part of the year 1884.

9. The court doth further find, that there was a one-sixth interest in said mine which it was agreed should be sold, and which was sold to H. B. Fergusson for

the sum of five hundred dollars, which sum of money was to be used and was used in the working and development of the said mine after the said compromise agreement.

10. The court doth further find, that after said compromise agreement, in August or September, 1883, down to April, 1885, a large amount of work had been done upon the said property, to obtain a patent therefor, and sufficient to discover mineral thereon.

11. The court doth further find, that after said compromise agreement of August, 1883, there was contributed, either by the complainants themselves, or for them, sufficient means and labor to pay their proportionate shares of the work upon the said mine to obtain a patent and to entitle them to the deed therefor.

12. The court doth further find, that in April, 1885, the complainants herein had complied with their part of the agreement sufficiently to entitle them to a deed from the said John Y. Hewitt, as such trustee, for their one-eighth interest each in and to said mine under said agreement.

13. The court doth further find, that the said W. H. (?) Patterson in person and by his agent did in April, 1885, demand a deed from the said John Y. Hewitt to his one-eighth interest in and to said mine, but that the said John Y. Hewitt, the defendant herein, declined and refused to make the said deed to the said W .H. (?) Patterson for his interest therein.

14. The court doth further find, that the said Hewitt, as such trustee, has never made the said deed, but

has always declined and refused to make the same, and has disputed the right of the said Patterson to his deed to the said one-eighth interest in said mine under said agreement.

15. The court doth further find, that the said C. Ewing Patterson demanded his deed to the said one-eighth interest in said Old Abe mine of and from the said Hewitt, the defendant herein, immediately prior to the date of the institution of this suit; that no demand was ever made by said C. Ewing Patterson prior thereto, but that the said Hewitt, the defendant therein, failed, neglected and refused to make, execute and leliver any deed for said interest to said C. Ewing Patterson.

16. The court doth find, that the said defendants herein, John Y. Hewitt, William Watson and H. B. Fergusson, during the years 1885, 1886, 1887, 1888, 1889, and up to the year 1890, did and performed a large amount of work and expended a large amount of money on the said Old Abe mine, in addition to the annual assessment required by the Government of the United States thereon; that neither of the said complainants have ever contributed or offered to contribute any part of the said expenses of said work and labor.

17. The court doth further find, that in November, 1890, the said defendants, Watson, Fergusson, and Hewitt, discovered a large body of rich ore upon the said mine, and since said date have taken out a large amount of gold ore from the said property, amounting to several hundred thousand dollars, the exact amount of which does not appear from the testimony herein.

18. The court doth further find, that about the month of ———, 1892, a corporation known as the Old Abe Mining Company was organized by said Hewitt, Fergusson and Watson, and others, and that the said ground, known as the Old Abe ground in controversy herein, including the said one-eighth interest each, so claimed by said C. Ewing Patterson and said Henry Patterson, was by said Hewitt deeded to said Old Abe Mining Company, and that the said mining company is now claiming title thereto, and that the stock of said company was divided so that Hewitt held one-third, said Watson one-third, said Fergusson one-fourth, and one-forty-eighth each to four Wheeling parties, associated with Mr. Fergusson in his original purchase of one-sixth of the property, and the capital stock remained so divided at least down to the time of the taking of defendants' testimony in this case in January, 1896.

19. The court doth further find, that the said C. Ewing Patterson left the Territory of New Mexico and removed to the State of New Jersey in the year 1892 (?) and has never since returned nor resided in this territory.

20. The court doth further find, that the said Henry Patterson left White Oaks, New Mexico, about the latter part of March, 1885, and that after that time to the fall of 1892 he was a non-resident of this Territory, living in California, Arizona, and other places on the Pacific coast.

21. The court doth further find, that since the said

Henry Patterson left this Territory, in April, 1885, neither he nor the said C. Ewing Patterson have in any way or manner contributed any means or labor for the development or improvement of said mine, and had taken no steps whatever, prior to the bringing of this suit, to enforce their rights or interests in said property, or to require the said Hewitt to carry out his agreement of August and September, 1883. That from April, 1885, to a short time prior to the date of the institution of this suit, in 1893, the said Henry Patterson and C. Ewing Patterson were both out of this Territory, and took apparently no interest in said property, and made no effort in any way to enforce their rights thereunder until the date of the institution of this suit.

22. The court doth further find, that the said Henry Patterson through his agent, Henry Burgess, had knowledge that the said defendant, Hewitt, had declined, neglected and refused to carry out the said agreement and make to him and his co-complainant deeds to the interests which they claim in and to said mine; that he had such notice, first, in April, 1885, and that he had such notice again in the summer of 1887, and that he, with his co-complainant, C. Ewing Patterson, through information received, were fully advised after April, 1885, that the said Hewitt had refused to make said deed or carry out said trust agreement.

23. The court doth therefore find, as a conclusion from the proofs and evidence in this case, and the facts established that the complainants herein are barred

from any right of recovery in this cause, and the bill herein should be dismissed.

The above findings of fact, concurred in by the two lower courts, relate only to the defense of laches; the District (or trial) Court having dismissed appellants' bill solely on the ground of laches, and having found the facts only with that ground in view.

The Supreme Court of the Territory, however, found that appellants' cause of motion was founded upon a parol or unwritten contract or agreement in the following words, to-wit:

"The appellants in this case claim the interest for which they now seek to recover, under an agreement made between themselves, Hewitt and others at a meeting held in August or September, 1883. This agreement was a parol or unwritten contract or agreement. There is no pretense of a written contract or agreement in this case;" and hold that appellants were barred both by laches and by the statutes of limitations of the Territory of New Mexico. (Record, p. 60, folio 104.)

It should also be stated that appellants, in their bill of complaint, charged no fraud or concealment upon Hewitt's part, and failed to allege any reason or excuse for their long delay in instituting their suit.

Another important fact,—i. e., the change in the condition of the mining property in controversy before appellants brought this suit, and *after* their cause of action, is ephasized in the opinion of the Supreme Court of the Territory at page 51 of the transcript of the record.

THE DOCTRINE OF LACHES.

The defense of appellants' laches was properly sustained by the courts below.

The salient facts established are, in substance:

1. That Hewitt was made trustee for appellants and others by a special oral agreement made in August or September, 1883.

2. That it was the duty of said trustee to deed certain specified interests in the mining property to the parties in interest, on certain conditions, to be performed by each, and to refuse to deed to such of said parties as refused or failed to perform such conditions.

3. That said trustee, Hewitt, refused to make deeds to appellants from the first demand and continuously, and disputed their right to deeds under the agreement.

4. That, however, Hewitt had been mistaken in such dispute and refusal, and appellants had become entitled to their deeds under said agreement, at the conclusion of the work done under said agreement, and were so entitled from and after March, 1885.

5. That appellants were fully informed of such refusal, and had knowledge that their claimed rights under said agreement were repudiated by the trustee, Hewitt, from and after April, 1885.

6. Appellants instituted this suit in April, 1893.

7. At least one important witness was lost by reason of appellants' long delay. (Record, p. 53, folio 95.)

8. Fluctuation in the value of the property. (Record, p. 51, folio 92.)

9. Loss of testimony. (Record, p. 53, folio 95.)

10. Change of ownership. (Record, p. 54, folio 96.)

POINTS AND AUTHORITIES.

Appellants delayed the institution of their suit in this case for at least eight years. This, under the facts before this court, is laches.

Twin Lick Oil Co. vs. Marburry, 91 U. S., 587.

Great West Min. Co. vs. Woodmas of Alston, Min. Co., 23 Pac. Rep., 908.

Kinne vs. Webb, 49 Fed. Rep.. 512.

Harwood vs. R. R. Co., 17 Wall., 78.

Brown vs. Co. of Buena Vista, 95 U. S., 157.

Hayward vs. Bank, 96 U. S., 611.

Holgate vs. Eaton, 116 U. S., 33; also 8 Sup. Ct. Rep., 825.

Holgate vs. Eaton, 116 U. S., 33; also 8 Sup. Ct. Rep., 825.

Societe Fonciere vs. Millikin, 135 U. S., 304; also 10 Sup. Ct. Rep., 823.

Hammond vs. Hopkins, 143 U. S., 224; also 12 Sup. Ct. Rep., 418.

Hoyt vs. Latham, 143 U. S., 567; also 12 Sup. Ct. Rep., 568; also 54 Fed., 34.

Pratt vs. California Min. Co., 24 Fed., 369.

Manning vs. San Jacinto Tin Co., 9 Fed., 726.

Kline vs. Vogel, 1 S. W., 733.
Halsted vs. Grinnan, 14 Sup. Ct. Rep., 641.
Richards vs. Mackall, 8 Sup. Ct. Rep., 437.
Macabe vs. Mathews, 15 Sup. Ct. Rep., 190.
Evers vs. Watson, 15 Sup. Ct. Rep., 430.
Johnston vs. Atl. Transit Co., 15 It., 520.
Johnston vs. Min. Co., 148 U. S. 360; also 13 Sup. Ct. Rep., 585.
Foster vs. R. R. Co., 146 U. S., 88; also 13 Sup. Ct. Rep., 23.

Complainants are required to allege and prove satisfactory reasons or excuses for long delay.

Badger vs. Badger, 2 Wall., 87.
Godden vs. Kimmel, 99 U. S., 201, and cases above cited.

Complainants are held to diligence in efforts to ascertain; and means of knowledge are held to be the same as knowledge.

Morris vs. Haggin, 28 Fed., 275.
Grimes vs. Sanders, 93 U. S., 55.
Mining Co. vs. Watrous, 61 Fed., 163 and cases above cited.

Delay cannot be excused except by some actual hindrance or impediment caused by the fraud or concealment of the party in possession.

Wagner vs. Baird, 7 How., 234.
Lansdale vs. Smith, 160 U. S., 391.

The excuse of absence, ignorance and poverty are held not sufficient.

Naddo vs. Bardon, 51 Fed., 493.

Galliher vs. Caldwell, 145 U. S., 317; also 12 Sup. Ct. Rep., 562 and 873; and cases cited in the opinion.

REPUDIATION OF TRUST BY TRUSTEE.

In express, continuing trusts, the question of repudiation by the trustee is important. But even in express, continuing trusts, after such notice of repudiation, the statute of limitations and the doctrine of laches both apply in all their vigor.

Naddo vs. Bardon, 51 Fed. Rep., 493.
Speidel vs. Henrici, 120 U. S., 377; also 7 Sup. Ct. Rep., 610.
Philippi vs. Philippi 115 U. S., 151.
Felix vs. Patrick, 145 U. S., 317; also 12 Sup. Ct. Rep., 862.
Woods vs. Carpenter, 101 U. S., 140.
Godden vs. Kimmel, 99 U. S., 201.
Wallensak vs. Reiher, 115 U. S., 96.

THE STATUTE OF LIMITATIONS.

Appellants claim that the Statute of Limitations of New Mexico, limiting actions concerning real estate to ten years, and applying in terms to suits in equity, prevents courts of equity from applying the doctrine of laches for delay short of ten years.

The statute upon which appellants rely is found in the Compiled Laws of the Territory of New Mexico (1897), Sec. 2938, and is as follows:

"No person, nor their children or heirs, shall have,

sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments, but within ten years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued, and that all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments shall be had and sued within ten years next after the title or cause of action or suits accrued or fallen, and at no time after the ten years shall have passed."

This contention is in conflict with the vast weight of authority.

The U. S. Supreme Court uses this language: "And the question of laches turns not simply upon the number of years which have elapsed since the accruing of her rights, whatever they were, and her assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years. But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not, like limitation, a mere matter of time; but principally a question of the inequity of permitting the claims to be enforced; an inequity founded upon some change in the condition or relations of the property or parties."

Galliher vs. Cadwell, 145 U. S., 368 (13 Sup. Ct. Rep., 874).

Badger vs. Badger, 2nd Wallace, 94.

Harwood vs. R. R. Co., 17th Wallace, 78.

McQuiddy vs. Ware, 17th Wallace, 91.

Twin Lick Oil Co. vs. Marburry, 91 U. S., 587.

Sullivan vs. R. R. Co., 94 U. S., 807.

Brown vs. County of Buena Vista, 95 U. S., 157.

Hayward vs. Bank, 96 U. S., 611.

Holgate vs. Eaton, 116 U. S., 33 (6 Sup. Ct. Rep., 224).

Davison vs. Davis, 125 U. S., 90 (8 Sup. Ct. Rep., 825).

Societe Fonciere vs. Milliken, 135 U. S., 304 (10 Sup. Ct., 823).

Hall vs. Russell (Oregon U. S. Circuit Ct.) Vol. II, Fed. Cases, p. 648. Affirmed in 101 U. S., 503. Also reported in 3 Sawyer, 506.

Manning vs. Hayden (U. S. Circuit Court) Vol. 16 Fed. Cases, p. 645. S. C. 106, U. S., 586 (First Sup. Ct. Rep., 617). Also reported in 5 Sawyer, 360; 7 Reporter, 428; 13 West Jur., 317.

Lakin vs. Sierra County, 25 Fed. Rep. 337.

In the state courts, under limitation laws similar to our own, the cases are equally full to the point that inexcusable delay for a period short of the time prescribed by the statute, constitutes laches, and is an equitable defense wholly independent and outside of the statute wherever the relief sought is wholly equitable as in this case.

Missouri holds the same doctrine.

Bliss vs. Pritchard (1877), 67 Mo., 181.
Kline vs. Vogel, (Mo. 1886), 1 S. W. Rep., 733.
Tatum vs. Holliday, 529 Mo., 426.
Landrum vs. Union Bank, 63 Mo., 56.
Morseau vs. Talbot, 55 Mo., 297.
Davis vs. Fox, 59 Mo., 127.

The Supreme Court of Alabama says, in passing upon the statute of limitations of that State, which in terms is applicable to suit commenced by bill in chancery:

"Independent of statutory limitations courts of equity act upon a rule peculiar to themselves which is designed to promote diligence on the part of suitors by refusing the enforcement of stale demands. The rule is not abrogated by the statute making the limitations of action at law applicable to suits in chancery. The statutory limitations and the peculiar rule coexist."

Scruggs vs. DeCatur, etc., 5 So. R., 441.

The Supreme Court of New York says, in construing a similar statute in that State:

"In the present case the cause of action was not barred by the ten year statute applicable to equitable actions. But we apprehend that the period of limitation of equitable actions fixed by the statutes is not, where a purely equitable remedy is invoked, equivalent to legislative direction that no period short of that time shall be a bar to relief in any case, or precludes the Court from denying relief in accordance with equitable

principles for unreasonable delay, although the full period of ten years has not elapsed since the cause of action accrued."

Calhoun vs. Delhi, etc., 24 N. E. Rep., 27.
Haywood vs. City of Buffalo, 14 N. Y., 540.
Town of Venice vs. Woodruff, 62 N. Y., 462.
Town of Springfield vs. Bank, 75 N. Y., 397, and see
Waller vs. Nelson (Ala.) 18 So. Rep., 154.
Frame vs. Kenny, Am. Dec., 367. (Annotated).
Nettles vs. Nettles, 67 Ala., 599.
James vs. James, 55 Ala., 525.
Bergen vs. Bennett, Gaines Cases (N. Y.) 19.
Sheldon vs. Kockwell, 9th Wis., 166-184.
Novens vs. White, 6 Johns. Chancery, 360.
Kerr on Fraud and Mistake, p. 303 et seq.
Story Eq. Jur., Sec. 1520; Pomeroy's Eq. Jur., Sec. 817; also Sec. 917 and note.

Similar citations might be made to an almost unlimited extent, but we submit that the foregoing are sufficient to sustain the position of defendants, and that complainants' bill should be dismissed for laches, notwithstanding the statutory period had not elapsed when this suit was commenced.

APPELLANTS BARRED IN FOUR YEARS.

Leaving aside the laches of appellants, and the ten years statute of limitations, just discussed, appellants are barred by Sections 2916 and 2930 of the Compiled

Laws of 1897 of the Territory of New Mexico, which sections are as follows:

"2916. Those founded upon accounts and unwritten contracts: those brought for injuries to property or for the conversion of personal property or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified, within four years."

"2930. None of the provisions of this act shall run against causes of action originating in or arising out of trusts, when the defendant has fraudulently concealed the cause of action, or the existence thereof, from the party entitled or having the right thereto."

The agreement, under which Hewitt's duties as trustee were prescribed and the rights of appellants were defined, was an "unwritten contract." And both the original bill of complaint of appellants and the findings of fact made by the courts below establish that no fraud or concealment of appellants' cause of action was practiced by Hewitt, but, on the contrary, his denial of the alleged rights of appellants was prompt and open and continuously adhered to.

St. Paul, etc., Ry. Co. vs. Sage, 49 Fed., 315.
Christy vs. Sill, 95 Pa. St., 315.
Hollinsheads Appeal, 103 Pa. St., 158a.
Silliman vs. Haas, 25 Atl. Rep., 72.
Way vs. Hooton, 26 Atl. Rep., 784.
King vs. Pardee, 96 U. S., 90.
Kellum vs. Smith, 33 Pa. St., 158.
Willard vs. Willard, 56 Pa. St., 119.

Porter vs. Mayfield, 21 Pa. St., 163.
Dole vs. Wilson, 40 N. W., 161.
Streitz vs. Hartman, 41 N. W., 804.

Did the trust agreement create an express trust?

If so, as, by its terms, it was not to be performed within one year, it is void under the statute of frauds.

The Statute of Frauds is in force in New Mexico.

Childers vs. Talbot, 16 Pac. Rep., 275.
Browning vs. Browning, 9 Pac. Rep., 677.

MINING CLAIMS ARE REAL ESTATE.

Mining claims are real estate.

Compiled Laws of New Mexico (1897) Sec. 2218.
Davis vs. Ford, 19 Pac. Rep., 414; also in 11 Sup. Ct. Rep., 417.

The five assignments of error, filed by appellants in this court, have been sufficiently treated in the foregoing brief of points and authorities.

Respectfully submitted,

H. B. FERGUSSON,
Attorney for Appellees.

Supreme Court of the United States.

No. 23.—October Term, 1904.

C. Ewing Patterson et al., Appellants, vs. John Y. Hewitt et al. } Appeal from the Supreme Court of the Territory of New Mexico.

[November 28, 1904.]

Appellants C. Ewing Patterson, a resident of New Jersey, and Henry J. Patterson, a resident of New Mexico, on April 29, 1903, filed their bill of complaint in the District Court for Lincoln County, Territory of New Mexico, against John Y. Hewitt, William Watson, Mathew Hoyle, and Harvey B. Fergusson, residents of New Mexico, and the Old Abe Company, a corporation of the same Territory, to enforce a trust which is alleged to have existed between the appellants and the defendant Hewitt, and by virtue of which they sought to recover a one-fourth interest in two mining locations made in the name of John Y. Hewitt on the 2d day of May, 1884. The bill prayed for an accounting of proceeds of ores taken from the mines, and a lien on the property, for an injunction and the appointment of a receiver.

The facts in the case as found by the District Court and adopted by the Supreme Court are substantially as follows:

In 1881 the property in controversy was claimed by the appellants and by Watson, one of the defendants, under locations previously made by them. Between 1881 and 1883, appellants, in conjunction with the defendant Watson, did a large amount of work upon the claims, and were asserting their rights under the mining laws of the United States. During this time the same ground was also claimed by other parties, among whom was the defendant Hewitt. In August, 1883, a dispute arose in regard to this property between appellants and the defendant Watson on one side, and the other parties upon the other side.

The parties interested held a meeting in August or September, 1883, for the purpose of adjusting the differences then existing between them, and to endeavor, if possible, to arrive at an agreement whereby the interests of all would be protected. The two appellants, the defendant Watson and the defendant Hewitt, with several others who were interested, attended this meeting. The result was an agreement between them that all the old locations then existing, whether made by the appellants or any of the defendants, or conflicting claimants, should be from that date abandoned, surrendered and given up by all of the parties, and that the ground

should be put in possession of Hewitt as trustee, to hold in his own name for the benefit of all the parties then interested. It was also agreed that Hewitt, as such trustee, should make a deed to such of the said parties holding interests therein as should contribute their part to the work, labor and expenses necessary to obtain a patent to the land; but there was no agreement as to what should become of the interests of any one who failed to contribute his share of the expenses. It was also agreed that each of the appellants contributing his share of the expenses should receive a one-eighth interest in the location, and that the said Watson and Hewitt should each receive a one-eighth interest, part on account of their services and part on account of their interests in the ground, and that the remaining shares should go to other parties who were interested therein.

In pursuance of this agreement Hewitt took charge of the property, and together with the defendant Watson, and one of the appellants Patterson, superintended and directed the work upon said mine during the year 1883 and part of the year 1884. In order to raise money for the working of the mine it was agreed that a one-sixth interest should be sold to H. B. Fergusson for five hundred dollars.

During 1884 and 1885 a sufficient amount of work was done upon the property to obtain a patent, and to discover mineral thereon. The appellants contributed their share of the work, which enabled the trustee to obtain a patent, and so far carried out their part of the agreement as to entitle them to a deed from the trustee for their one-eighth interest each, according to said agreement.

In April, 1885, the appellant Henry J. Patterson, in person and by his agent, demanded a deed from Hewitt, trustee, of the one-eighth interest to which he claimed to be entitled; but the defendant Hewitt at that time refused to make the said deed, and has ever since refused to execute the same, and has disputed his right thereto.

No demand for a deed appears to have been made by C. Ewing Patterson until just before the commencement of this suit, when it was also refused.

In 1883, the complainant C. Ewing Patterson left New Mexico, and, up to the time of the bringing of this suit, had never returned there. The appellant Henry J. Patterson left in 1885, and from that time until the fall of 1892 was a non-resident of New Mexico.

From 1885 to 1890 the defendants performed a large amount of work, and expended a good deal of money on the mine in addition to the annual assessment required by the Government of the United States thereon; but neither of the appellants ever contributed or offered to contribute any part of the expenses of said work, or perform any labor.

In November, 1890, the defendants discovered a large body of rich ore in the mine, and since that date have taken out therefrom gold amounting

to several hundred thousand dollars. In 1892, a corporation known as the Old Abe Mining Company, was organized by the defendants Hewitt, Fergusson, Watson and others, and the ground in controversy, known as the Old Abe ground, including the interests claimed by the appellants, was turned over to the new corporation by the trustee Hewitt, and this corporation is now holding title thereto.

The appellant Henry J. Patterson, through his agent, Henry Burgess, had knowledge from April, 1885, that Hewitt had refused to carry out said agreement, and execute the deed to him and his co-complainant, and both of the appellants were again informed after April, 1885, that Hewitt had refused to make the said deeds or to carry out the trust agreement.

Upon this state of facts the District Court dismissed the bill upon the ground of laches. The Supreme Court of the Territory affirmed its action, (66 Pac. Rep. 553), and complainants appealed to this court.

Mr. Justice BROWN delivered the opinion of the Court.

The defense of laches, which prompted the dismissal of the bill in this case, has so often been made the subject of discussion in this court that a citation of cases is quite unnecessary. Some degree of diligence in bringing suit is required under all systems of jurisprudence. In actions at law, the question of diligence is determined by the words of the statute. If an action be brought the day before the statutory time expires, it will be sustained; if the day after, it will be defeated. In suits in equity the question is determined by the circumstances of each particular case. The statute of limitations consorts with the rigid principles of the common law, but is ill adapted to the flexible remedies of a court of equity. The statute frequently works great practical injustice—the doctrine of laches, never. True, lapse of time is one of the chief ingredients, but there are others of almost equal importance. Change in the value of the property between the time the cause of action arose and the time the bill was filed; complainant's knowledge or ignorance of the facts constituting the cause of action, as well as his diligence in availing himself of the means of knowledge within his control, are all material to be considered upon the question whether the suit was brought without unreasonable delay.

1. In the case under consideration the appellants claim the benefit of section 2938 of the Compiled Laws of New Mexico, to the following effect:

"No person or persons, nor their children or heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments, but within ten years next after his, her or their right to commence, have or maintain such suit shall have, come, fallen or accrued," &c.

If this were an action of ejectment at law, there seems to be no question but what it could be maintained, since it was brought within ten years

from the time the cause of action accrued; but where the statute is in terms applicable to suits in equity, as well as at law, it is ordinarily construed, in cases demanding equitable relief, as fixing a time beyond which the suit will not under any circumstances lie, but not as precluding the defense of laches, provided there has been unreasonable delay within the time limited by the statute. In an action at law courts are bound by the literalism of the statute, but in equity the question of unreasonable delay within the statutory limitation is still open. (*Alsop* v. *Riker*, 155 U. S. 448–460.)

If this were not so, it would seem to follow that in the code States where there is but one form of action applicable both to proceedings of a legal and equitable nature, a statute of limitations, general in its terms, would apply to suits of both descriptions and the doctrine of laches become practically obsolete. This, however, is far from being the case, as questions of laches are as often arising and being discussed in the code States as in the others. In a few cases where the statute of limitation is made applicable in terms to suits in equity, it has been construed as allowing a suit to be begun at any time within the period limited by the statute, notwithstanding the intermediate laches of the complainant, although in those cases it will usually be found that the language of the statute is explicit and imperative. (*Hill* v. *Nash*, 73 Miss. 849; *Washington* v. *Soria*, 73 Miss. 665.)

But the weight of authority is the other way, and we consider the better rule to be that, even if the statute of limitations be made applicable in general terms to suits in equity, and not to any particular defense, the defendant may avail himself of the laches of the complainant, notwithstanding the time fixed by the statute has not expired. This has been expressly held in Alabama, (*Scruggs* v. *Decatur Mineral & Land Co.*, 86 Ala. 173;) in Missouri, (*Bliss* v. *Prichard*, 67 Mo. 181; *Kline* v. *Vogel*, 90 Mo. 239;) and in New York, (*Calhoun* v. *Delhi &c. R. R. Co.*, 121 N. Y. 69.) In the last case the question is discussed at considerable length by Chief Judge Andrews, and the conclusion reached that "the period of limitation of equitable actions fixed by the statute is not, where a purely equitable remedy is invoked, equivalent to a legislative direction that no period short of that time shall be a bar to relief in any case or preclude the court from denying relief in accordance with equitable principles for unreasonable delay, although the full period of ten years has not elapsed since the cause of action accrued. . . ."

Indeed, in some cases the diligence required is measured by months rather than by years. (*Pollard* v. *Clayton*, 1 Kay & Johnson, 462; *Atwood* v. *Small*, 6 Clark & Finelly, 356.)

And in others a delay of two, three or four years has been held fatal. (*Twin Lick Oil Co.* v. *Marbury*, 91 U. S. 587; *Hayward* v. *Eliot Natl. Bank*, 96 U. S. 611; *Holgate* v. *Eaton*, 160 U. S. 33; *Hagerman* v. *Bates*, 5 Colo. App. 391; *Graff* v. *Portland Co.*, 12 Colo. App. 106.)

2. The facts in this case, so far as they concern the applicability of the defense of laches, are that all prior locations made by the claimants to this land were abandoned in August, 1883, when an oral agreement was entered into that Hewitt should be appointed trustee for all concerned; that upon the performance of certain conditions by the parties interested he should make a deed to each of such parties as should contribute his part to the work and expense necessary to obtain a patent; that each of the appellants contributed his share of the work in the years 1883 and 1884—enough to entitle each of them to a deed of his interest under the agreement; that in April, 1885, Henry J. Patterson demanded a deed of Hewitt, which was refused, but that C. Ewing Patterson did not demand his deed until just before the institution of this suit; that the defendants and their associates, from the year 1885 to 1890, performed a large amount of work in developing the mine to which neither of the appellants contributed any part; that in November, 1890, a large body of rich ore was discovered, and since that time gold to the amount of several hundred thousand dollars has been taken out. Both of the appellants left the Territory of New Mexico during the year 1885, and resided abroad up to the time of the beginning of this suit. Both were aware that Hewitt had refused to deed them their interest in the mine and in the patent which he in the meantime had obtained to the property.

It thus appears that the right of action accrued to the appellants in April, 1885, and that this suit was not begun until eight years thereafter—in 1893. Whether the refusal of Hewitt to make the deeds was right or wrong, is not material here. There is no doubt from the findings that appellants had no share in the subsequent development of the mine or the discovery of the ore in 1890, and that it was through the efforts and perseverance of the defendants, and the aid they received from Fergusson, that they were put in possession of this valuable property. If appellants had expected a share in this property they should either have brought a bill promptly to enforce their rights, or at least contributed their proportionate share to the subsequent work and labor, and the expenses then incurred. To award them now a deed to their original interest in the property would be grossly unjust to the defendants, through whose exertions the value of the property was discovered and the mine put upon a paying basis. While it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to nought. There is no class of property more subject to sudden and violent fluctuations of value than mining lands. A location which to-day may have no salable value may in a month become worth its millions. Years may be spent in working such property apparently to no purpose, when suddenly a mass of rich ore

may be discovered, from which an immense fortune is realized. Under such circumstance, persons having claims to such property are bound to the utmost diligence in enforcing them, and there is no class of cases in which the doctrine of laches has been more relentlessly enforced.

3. But little need be said in reply to appellant's argument, that a trust relation was established between these parties by the oral agreement of 1883, under which Hewitt was to take possession, hold the property for the benefit of all concerned, and ultimately to convey to each his proportionate share. In this connection it is sought to apply the familiar rule that neither laches nor the statute of limitations is applicable against an express trust, so long as that trust continues. Conceding all that can be claimed as to the existence of an express parol trust in this case, the refusal of Hewitt to execute the deed to H. J. Patterson of his interest in the property, of which both appellants had notice, was a distinct repudiation of such trust, which entitled the complainants to immediate relief and opened the door to the defense of laches. (*Speidel* v. *Henrici*, 120 U.S. 377–386; *Ridell* v. *Whitehill*, 135 U. S. 621–634.)

The Supreme Court of the Territory also found that the case was within section 2916 of the Compiled Laws of the Territory, requiring that all actions founded upon "unwritten contracts . . . or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified," shall be brought within four years; and that this defense was not answered by section 2930, declaring that "none of the provisions of this act shall run against causes of action originating in or arising out of trusts, when the defendant has fraudulently concealed his cause of action, or the existence thereof, from the parties entitled or having the right thereto." As there was no evidence that the defendants had fraudulently concealed the facts from the appellants, and abundant proof that the facts were known to them, the latter section was held not to apply. While the case does not necessarily involve it, we see no reason to question the correctness of the court's conclusion on this point.

We are clearly of the opinion that the delay of eight years in this case was inexcusable, and the decree of the court below must, therefore, be

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.